International Asset Transfer
An Overview of the Main Jurisdictions

International Asset Transfer An Overview of the Main Jurisdictions

A Practitioner's Handbook

Edited by

Gero Pfeiffer, Sven Timmerbeil, Frederik Johannesdotter

in collaboration with

Kay L. Tidwell

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Preface

Business transactions do not stop at national borders. The objective of this handbook is to explain the basic legal issues that must be considered when acquiring a business by way of an asset deal in any of thirty-two major jurisdictions around the world. The authors of the chapters are all local lawyers working in international law firms or enterprises, well-reputed local firms, associations or academic institutions. All of them have practiced mergers and acquisitions in the field of corporate law for a number of years in their respective jurisdictions.

Publishing a handbook with authors from so many countries is challenging not only from a substantive perspective but also in terms of coordination and process management. The editors have tried to ensure that the chapters – which were contributed to by sixty-nine authors in total (including several co-authors in a number of countries) – are as uniform in language and presentation as possible, so as to emphasize the substantive differences among the laws of the various jurisdictions. Special thanks in this regard goes to our American colleague Kay Tidwell, who reviewed from a native-speaker perspective all of the chapters in this tome and provided comments to improve fluency and readability.

We hope that this handbook may serve as helpful guidance to the reader when considering an acquisition of assets in any of the jurisdictions covered here. Should you need any individual local legal advice, the authors are happy to assist you. Their contact details are set forth in the Directory of Authors following the Table of Contents.

Many thanks to the publisher Walter de Gruyter, and in particular to Michael Schremmer, who was very patient with us during the entire project. Particular appreciation is due also to all the authors for their participation in the publication of this handbook and all the other individuals who supported us, including but not limited to Nina Siegfried, Ronny Duckstein and Jacqueline Killian.

Gero Pfeiffer — Sven Timmerbeil — Frederik Johannesdotter

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Directory of Authors

Introduction	**Kay L. Tidwell** Tel.: +1 (213) 891 8419 Fax: +1 (213) 891 8763 kay.tidwell@lw.com	**Latham & Watkins LLP** 355 South Grand Avenue Los Angeles CA, 90071-1560 USA www.lw.com
Argentina	**Christian Krüger** Tel.: +54 (11) 4114 3000 Fax: +54 (11) 4114 3001/2 ck@pagbam.com.ar **Juan Pedeflous** Tel.: +54 (11) 4114 3000 Fax: +54 (11) 4114 3001/2 jp@pagbam.com.ar	**Pérez Alati, Grondona, Benites, Arntsen & Martínez de Hoz (h)** Suipacha 1111, piso 18 1008 – Buenos Aires Argentina www.pagbam.com.ar
Australia	**John Mollard** Tel.: +61 (3) 9617 4450 Fax: +61 (3) 9614 2103 john.mollard@bakernet.com	**Baker & McKenzie** Level 19 181 Williams Street Melbourne, Victoria 3000 Australia www.bakernet.com
	Jason Cornwall-Jones Tel.: +61 3 9679 3000 Fax: +61 3 9679 3111 jason.cornwall- jones@blakedawson.com	**Blake Dawson** Level 26 181 Williams Street Melbourne, Victoria 3000 Australia www.blakedawson.com
Austria	**Andreas Zahradnik** Tel.: +43 (1) 5334795 42 Fax: +43 (1) 5334795 5042 andreas.zahradnik@dbj.at **Co-Author:** Barbara Cervenka	**DORDRA BRUGGER JORDIS Rechtsanwälte GmbH** Dr. Karl Lueger-Ring 10 1010 Vienna Austria www.dbj.at
Belarus	**Maksim Salahub** Tel.: +375 (17) 306 2102 Fax: +370 (17) 306 2079 sorainen@sorainen.com **Co-Authors:** Kiryl Apanasevich, Ann Valchok, Iryna Mitsianiova	**Sorainen** Pobediteley Ave. 23/3 220004 Minsk Belarus www.sorainen.com

Brasil	**Marcelo Takeyama** Tel.: +55 (11) 3065 4480 Fax.: +55 (11) 3064 6049 marcelo.takeyama@baschrameh.com.br **Roberta Marques de Camargo Vianna Godoy** Tel: + 55 (11) 3065 4469 Fax: + 55 (11) 3064 6049 roberta.vianna@baschrameh.com.br	**Basch & Rameh** Rua da Consolação, 3741-13o 01416-001 – São Paulo, SP Brasil www.baschrameh.com.br
Bulgaria	**Plamen Marintchov Borissov** Tel.: +359 (2) 811 7751 Fax: +359 (2) 811 7752 office@borissov-law.com	**Borissov Law** NDK Administrative Building 1 Bulgaria Sq., P.O. Box 246 1463 Sofia Bulgaria www.borissov-law.com
Canada	**Stephen Rigby** Tel.: +1 (416) 865 7793 Fax: +1 (416) 865 7048 stephen.rigby@mcmillan.ca **Bruce Chapple** Tel.: +1 (416) 865 7024 Fax: +1 (416) 865 7048 bruce.chapple@ mcmillan.ca	**McMillan LLP** Brookfield Place, Suite 4400 Bay Wellington Tower 181 Bay Street Toronto, Ontario M5J 2T3 Canada www.mcmillan.ca
China (PRC)	**Audry (Hong) Li** Tel.: +86 (21) 5037 2011 Fax: +86 (21) 5037 2678 audryli@zhonglun.com **Lefan Gong** Tel.: +86 (21) 5037 2668 Fax: +86 (21) 5037 2678 lefangong@zhonglun.com	**Zhong Lun Law Firm** 200 Yin Cheng Road Central 11th Floor, Bank of China Tower Pudong, Shanghai, 200120 China www.zhonglun.com
Colombia	**Andrés Téllez-Núñez** Tel.: +57 (1) 2749901 Fax: +57 (1) 2749901 tellez.andres@gmail.com	**Pontificia Universidad Javeriana** Facultad de Ciencias Jurídicas Calle 40 No. 6-23 Colombia www.javeriana.edu.co
Denmark	**Nils Kjellegaard Jensen** Tel.: +45 (36) 944 113 Fax: +45 (36) 944 010 nils@nkj-legal.com	**Law Firm Kjellegaard Jensen** Tuborg Boulevard 12, 3rd Floor 2900 Hellerup (Copenhagen) Denmark www.nkj-legal.com

England & Wales	**Andrew Gillen** Tel.: +44 (207) 295 3000 Fax: +44 (207) 295 3500 andrew.gillen@traverssmith.com **Co-Author:** Fay Anthony	**Travers Smith** 10 Snow Hill London EC1A 2AL UK www.traverssmith.com
Estonia	**Paul Künnap** Tel.: +372 (6) 400 900 Fax: +372 (6) 400 901 paul.kunnap@sorainen.ee **Toomas Prangli** Tel.: +372 (6) 400 900 Fax: +372 (6) 400 901 toomas.prangli@sorainen.ee	**Sorainen** Pärnu mnt 15 10141 Tallinn Estonia www.sorainen.com
France	**Bénédicte Bremond** Tel.: +33 (1) 4062 2080 Fax: +33 (1) 4062 2062 benedicte.bremond@lw.com	**Latham & Watkins AARPI** 53, quai d'Orsay 75007 Paris France www.lw.com
Germany	**Sven Timmerbeil** Tel.: +49 (176) 2079 1408 Fax: +49 (69) 6062 6700 sut@georgetown.edu **Gero Pfeiffer** Tel.: +49 (69) 6062 6560 Fax: +49 (69) 6062 6700 gero.pfeiffer@lw.com **Frederik Johannesdotter** Tel.: +49 (69) 6062 6000 Fax: +49 (69) 6062 6700 frederik.johannesdotter@lw.com	**Latham & Watkins LLP** Reuterweg 20 60323 Frankfurt am Main Germany www.lw.com
Hungary	**Péter Berethalmi** Tel.: +36 (1) 487 8712 Fax: +36 (1) 487 8701 berethalmi.peter@nt.hu	**Nagy és Trócsányi Ügyvédi Iroda** Ugocsa utca 4/B 1126 Budapest Hungary www.nt.hu
India	**Shourya Mandal** Tel.: +91 (33) 40056000 Fax: +91 (33) 40056016 shourya.mandal@foxmandal.com **Orijit Chatterjee** Tel.: +91 (33) 40056000 Fax: +91 (33) 40056016 orijit.chatterjee@foxmandal.com	**Fox Mandal** 6, Church Lane Kolkata - 700001 India www.foxmandal.com

Italy

Carlo Pianese
Tel.: +971 (4) 4267 125
Fax: +971 (4) 4267 199
carlo.pianese@allenovery.com

Co-Author:
Elia Ferdinando Clarizia

Allen & Overy
Suite 101/202, Level 1&2
The Gate Village Building GV08
Dubai International Finance Centre
PO Box 506678,
Dubai
United Arab Emirates
www.allenovery.com

Japan

Kengo Nishigaki
Tel.: +81 (3) 5157 2790
Fax: +81 (3) 5157-2903
kengo.nishigaki@bakernet.com

Co-Author:
Rodell Molina

Baker & McKenzie
The Prudential Tower 2-13-10
Nagatacho Chiyoda-ku
Tokyo 100-0014
Japan
www.taalo-bakernet.com

Latvia

Agris Repšs
Tel.: +371 (6) 736 5000
Fax: +371 (6) 736 5001
agris.repss@sorainen.lv

Co-Authors:
Eva Berlaus-Gulbe
Lauma Bērziņa
Ūve Zosārs

Sorainen
Kr. Valdemāra 21
1010 Riga
Latvia
www.sorainen.com

Lithuania

Mantas Petkevičius
Tel.: +370 (5) 268 5040
Fax: +370 (5) 268 5041
mantas.petkevicius@sorainen.lt

Co-Author:
Laimonas Skibarka

Sorainen
Jogailos g. 4
01116 Vilnius
Lithuania
www.sorainen.com

Malaysia

Ang Siak Keng
Tel.: +604 227 0888
Fax: +604 228 6755
siak.keng.ang@zaidibrahim.com.my

Co-Authors:
Chew See Khee
Tan Lay Choo
Gooi Kathleen
Teoh Pei Pei

Zaid Ibrahim & Co.
No. 51-22-B&C
Menara BHL
Jalan Sultan Ahmad Shah
10050 Penang
Malaysia
www.zaidibrahim.com

Mexico

Eugenio Bernal
Tel.: +52 (55) 5540 9629
Fax: +52 (55) 5540 9699
ebernal@whitecase.com

Lizette Neme Bechara
Tel.: +52 (55) 5540 9656
Fax: +52 (55) 5540 9699
lneme@whitecase.com

White & Case, S.C.
Blvd. Manuel Ávila Camacho 24 - PH
Lomas de Chapultepec
Mexico City, 11000
Mexico
www.whitecase.com

Netherlands

Kim F. Tan
Tel.: +31 (20) 551 7906
Fax: +31 (20) 626 7949
kim.tan@bakernet.com

Baker & McKenzie Amsterdam N.V.
Claude Debussylaan 54
1082 MD Amsterdam
The Netherlands
www.bakernet.com

Russia

Alexander Kalinov
Tel.: +7 (812) 332 9300
Fax: +7 (812) 332 9341
akalinov@chadbourne.com

Co-Author:
Nadezhda Drobilko

Chadbourne and Parke LLP
Stroganovsky Business Centre
19A Nevsky Prospect
St. Petersburg 191186
Russian Federation
www.chadbourne.com

Singapore

Colin Ong Pang Huan
Tel.: +(65) 6416 8004
Fax: +(65) 6532 5711
colin.ong@wongpartnership.com

WongPartnership LLP
One George Street 20-01
Singapore 049145
Republic of Singapore
www.wongpartnership.com.sg

South Africa

Madelein Burger-van der Walt
Tel.: +27 (11) 530 5278
Fax: +27 (11) 530 6278
madelein.burger-vanderwalt@webberwentzel.com

Co-Authors
Brian Dennehy
Bernadette Heever
Claire Gaul

Webber Wentzel
10 Fricker Road
Illovo Boulevard
Johannesburg 2107
South Africa
www.webberwentzel.com

Spain

Juan Manuel De Remedios
Tel.: +34 (917) 915 016
Fax: +34 (902) 882 228
juanmanuel.deremedios@lw.com

Paco Iso
Tel.: +34 (917) 915 011
Fax: +34 (902) 882 228
mariano.francisco@lw.com

Xavier Pujol
Tel.: +34 (917) 915 018
Fax: +34 (902) 882 228
xavier.pujol@lw.com

Manuel Deó
Tel.: +34 (917) 915 013
Fax: +34 (902) 882 228
manuel.deo@lw.com

Latham & Watkins LLP
Marìa de Molina 6, 4th Floor
28006 Madrid
Spain
www.lw.com

<table>
<tr><td>Switzerland</td><td>Eva-Maria Strobel
Tel.: +41 (44) 384 1411
Fax: +41 (44) 384 1214
eva-maria.strobel@bakernet.com

Co-Author:
Matthias Maurer</td><td>Baker & McKenzie
Zollikerstrasse 225
8034 Zurich
Switzerland
www.bakernet.com</td></tr>
<tr><td>Taiwan (ROC)</td><td>Jackie S.J. Lin
Tel.: +886 (2) 2781 4111
Fax: +886 (2) 2721 3834
jackielin@tsartsai.com.tw

Yvonne C.Y. Liu
Tel.: +886 (2) 2781 4111
Fax: +886 (2) 2721 3834
yvonneliu@tsartsai.com.tw</td><td>Tsar & Tsai Law Firm
8th Fl., 245 DunHua S. Rd., Sec. 1
Taipei 106
Taiwan R.O.C.
www.tsartsai.com.tw</td></tr>
<tr><td>United Arab Emirates</td><td>Florian Amereller
Tel.: +971 (4) 332 9686
Fax: +971 (4) 332 9687
fa@amereller.com

Jochen Murach
Tel.: +971 (4) 332 9686
Fax: +971 (4) 332 9687
murach@amereller.com</td><td>Amereller Legal Consultants
P.O. Box 97706
Dubai
United Arab Emirates
www.amereller.com</td></tr>
<tr><td>United States of America</td><td>Marcel Valenta
Tel.: +1 (650) 857 3710
Fax: +1 (650) 857 6238
marcel.valenta@hp.com</td><td>Hewlett-Packard Company
3000 Hanover Street
Palo Alto, CA 94304
USA
www.hp.com</td></tr>
<tr><td>Vietnam</td><td>Matthias Dühn
Tel.: +84 (8) 38 239 772
Fax: +84 (8) 38 230 909
duehn@gba-vietnam.org</td><td>German Business Association (GBA)
5th Floor Somerset Chancellor Court
21–23 Nguyen Thi Minh Khai Street,
District 1
Ho Chi Minh City
Vietnam
www.gba-vietnam.org</td></tr>
<tr><td></td><td>Christoph Angerbauer
Tel.: +84 (8) 38244 225
Fax: +84 (8) 38244 226
christoph.angerbauer@roedlasia.com</td><td>Rödl & Partner Vietnam Legal Ltd.
5th Floor Somerset Chancellor Court
21–23 Nguyen Thi Minh Khai Street
District 1
Ho Chi Minh City
Vietnam
www.roedl.com</td></tr>
</table>

Introduction

By *Kay L. Tidwell*

A. International M&A

Long gone is the time when deals were confined within the borders of nations. Even now, as the global economy contracts in the wake of one of the worst recessions in history, the trend of globalization remains remarkably strong. Capital, labor and products are becoming increasingly mobile, and as they are moved across borders causing markets to converge, they generate greater competition and new opportunities for strategic cross-border acquisitions and dispositions. In many ways, mergers and acquisitions (M&A) are as much a cause as an effect of economic globalization; M&A is both a means of integrating global economies and a natural consequence of that integration. The advent of the cross-border M&A transaction is perhaps the strongest evidence of this. In 2007, for the first time history, the value of cross-border M&A deals rivaled the value of domestic M&A deals. According to the United Nations World Investment Report 2008, despite the languishing liquidity crisis and altered lending behavior, cross-border M&A activity in the second half of 2007 grew USD 879 billion to a record high, mostly owing to mega deals that were on an unparalleled scale.

There are many strategic reasons why international M&A makes sense, even in times like the present. Not least among them is the ability to access the wealth of opportunities presented by the expansion of global markets and to effectively compete with foreign firms to maximize market power. Acquiring a foreign firm may be the most direct way to tap a foreign market, and it is certainly easier than starting from scratch and creating a "greenfield" subsidiary. Macroeconomic differences between countries and the potential for substantial synergies also drive firms to consider cross-border deals. The relatively low cost of transportation and communication, coupled with an overall trend in market deregulation, have helped make cross-border transactions more attractive, and have facilitated the meeting of expanding demand in developing and Third World countries.

Although the acquisition of a business organization is perhaps one of the most complex legal transactions that can be undertaken, the process always begins with the basic question of how to structure the transaction, and this is true whether it involves a foreign entity or not. Similarly, the possibilities are no different: the transaction can either be structured as an acquisition of individual assets (asset deal) or an acquisition of shares or interests in the company operating the business (share deal). The many issues that must be considered in order to arrive at the fundamental and significant decision of which method to choose, 'why' and, in an even larger sense, 'where' are the primary subject of this book. Obviously, the decision as between the alternatives depends on a multitude of considerations, which include, among many others, tax treatment and liability issues under the laws of a particular country. The treatment of these issues may – and often does – vary from one jurisdiction to another. It is this book's aim to provide helpful guidance on the most significant structural considerations in an acquisition of assets and the distinctions and characteristics among them in major jurisdictions around the world.

B. The Asset Deal

What should be immediately apparent to the reader in the following chapters is that, despite the variations as among legal regimes, there is a typical and familiar set of transfer issues that arise in any asset deal, anywhere. These issues are the principal structural concerns that every lawyer doing a deal will have to address. First and foremost, it is self-evident that there are problems associated with the sheer variety of assets that may be the subject of an acquisition. Tangible assets demand different treatment than intangible assets, such as intellectual property rights. The transfer of real property, contracts, receivables, employment relationships and even liabilities also often require particular treatment. In most jurisdictions, these assets can be transferred, but not without special consideration being given to the technical complexities that each brings to the table. This is to say nothing of the variances among the different transfer concepts, which may have different legal requirements to facilitate a valid transfer.

Tax considerations, which are at once complex and crucial, are emphasized throughout this text, as is the accompanying caveat that any serious questions about tax matters should always be brought to competent tax counsel early in the game before the conversations on structuring the deal even commence. It cannot be said enough: the tax treatment of an acquisition is assuredly a highly technical area of the law nearly everywhere in the world, and its consequences shape the course of the transaction at the most essential level. After-tax consequences vary dramatically depending how a deal is structured, and could mean the difference between a share deal or an asset deal, or *no* deal. Its varied application to certain assets may determine everything from purchase price to the relative bargaining postures of the respective parties. State and local sales taxes, taxes on real estate conveyances and stock transfers are among the key forms of tax that have to be addressed.

Other issues that the reader will find discussed in each chapter include the degree to which assets must be specified (for identification purposes) to ensure that the transfer will be valid in the respective jurisdiction; liability issues, including insolvency, environmental hazard and contamination (in some countries, the purchaser may be liable for contamination caused by the seller); labor and employment considerations (and how they influence and are influenced by unions, works councils, as well as the rudimentary question of whether employees will be transferred automatically with the other assets of the target), employee objection rights regarding the transfer, and company pension schemes.

The subject of permits and approvals – in all forms and from all authorities – is of course also discussed here. Of particular interest in the context of any cross-border transaction is whether the transaction can happen *at all*, since at least some governments impose strict limitations on the acquirer if it is a foreign entity, depending on the asset in question or its value, and almost all require some sort of government approval for such an acquisition. In addition to regulatory approvals that may have to be obtained by a foreign acquirer to consummate the acquisition, there may also be certain state or local authorizations required for the operation of the business, which could be related to the personnel employed or the facility used to run the business. Lastly, due consideration is given to the subject of corporate authorization and internal approval requirements, such as the need to obtain board or other approvals, which is also often tied to the nature of the assets or the value of the transaction.

There are a number of other relevant considerations that are touched upon in this book, such as encumbrances (mortgages and liens), the form and language of the agreement, choice of law and the availability of arbitration (to settle any disputes under the purchase agreement), as well as any special protocol (such as notarization, registration or filings) that must be followed to make the agreement effective.

The menu of topics here is by no means exhaustive, and there are certainly a few things that are not covered in this text, such as the integration process, cultural resistance, post-merger activities and (in many chapters) anti-trust issues, all of which are not unimportant to the average deal. But it is our hope that we have covered the essentials in each chapter of this book in order to give the practicing M&A lawyer an adequate sense of what to expect in an acquisition in each jurisdiction, as well as how to be prepared for it. And as the adage goes, "knowing is half the battle."

C. The Purpose of this Book

If it has not yet become evident, the purpose of this book is singular: to provide the kind of practical guidance any transactional lawyer might seek in the context of selecting whether to structure a transaction as a share purchase or asset purchase, where the entities involved are not domestic and the lay of the law is, at best, unfamiliar. The essays comprising the book canvass thirty-two major jurisdictions to draw on the most valuable and highly-regarded commodity a legal practitioner can possess – raw experience, acquired over time and iterations of transactions – and seek to present, in a brief and palatable fashion, the kind of wisdom one might desire when making a decision that could have far-reaching consequences in an area with which one has very little familiarity. There are no theoretical detours into the rationale of why and how the law in each jurisdiction may have evolved into its current state or reflections on how it could be improved, as this kind of philosophical debate is about as useful for our purposes as a solar-powered flashlight. Instead, the focus here is strictly on articulating and analyzing the experiences of transactional lawyers in each of these thirty-two countries in order to enable an informed decision on how to structure a transaction that might implicate the laws of any of these jurisdictions.

As is often the case today, transactions involve a variety of assets, some of which may be subject to unconventional treatment in various lands. These essays highlight those areas, with a particular eye towards anticipating potential problems and recommending viable solutions. The practical considerations include an understanding of how the transaction works from a timing perspective, what certain protocol are required for validity and enforceability of agreements under the law of the jurisdiction, and how to improve project management for optimal efficiency in getting the deal done. Considerations such as confidentiality (and how to preserve it in light of certain reporting and filing requirements in the respective jurisdiction), the extent to which local counsel must be engaged, and the best approach to coordinating with local counsel (providing specific instructions based on more than a rudimentary understanding of potential issues) are discussed. The substantive aspects of the law and basic acquisition principles, while necessarily informing the practical advice given here, are beyond the scope of this book, which treats solely those considerations that are relevant to *doing deals*. That said, it should not be construed as merely of potential interest to lawyers; investment bankers, accountants, entrepreneurs and anyone else who contributes to and is engaged in the art of deal-making will find the content of this book useful, especially when contemplating a cross-border transaction.

D. How to Use this Book

The chapters of this book are designed to be as user-friendly as possible for the practicing attorney, who, more often than not, may have one or two specific questions in mind about an aspect of law in a particular jurisdiction and, more often than not, little time to waste looking for the answer in a dense academic treatise. To that end, each chapter is devoted to the laws of single jurisdiction, and is organized identically under the same headings applicable to all jurisdictions. Treatment of each subject is terse, relevant and formulaic. The editors (myself included) have done their utmost to streamline the vocabulary and legal terms of art, while recognizing fully that some subtleties of the individual languages may necessarily force us to sacrifice accuracy for the sake of simplicity. We hope that the underlying meaning is nevertheless conveyed.

Finally, no text on a legal subject would be complete without the usual set of disclaimers. Obviously, while the authors of these texts have endeavored to provide practical guidance on the most important aspects that should be considered in an acquisition of assets or shares in their respective jurisdictions, this guidance should not be construed as – and is by no means a substitute for – the advice of legal counsel familiar with the particular facts and circumstances of a situation. The authors of the following essays offer, at best, only general observations and recommendations based on their experiences. They (and we) make no representation as to the validity, completeness or accuracy of any of their statements, which should be read as reflecting the legal situation in each respective jurisdiction as of June 1, 2009. It goes without saying, further, that each author is only responsible for the essay concerning his or her particular jurisdiction.

Although whole books on the subject of M&A have been written about many of these jurisdictions (and we commend them to you), our objective here is to bring together in a single volume the wealth of knowledge and experience of practicing M&A attorneys in each of these jurisdictions. We hope that the wisdom collected here will serve you well in the many cross-border transactions that are sure to come your way.

Argentina

By *Christian Krüger* and *Juan Pedeflous*

A. General Aspects

1. Asset Deal vs. Share Deal: Essential Considerations

There are various considerations that have to be taken into account when deciding whether a transaction should be structured as a share purchase and transfer or as an asset purchase and transfer, but normally the purchase of shares is the preferred method.

Probably the most important aspect is tax considerations. Neither value added tax nor income tax (provided the seller is a natural individual domiciled in or outside Argentina who is not engaged in the trade of stock as his or her profession or a legal entity domiciled outside Argentina) are applicable to the sale of shares.

On the other hand, as a general rule, income tax and value added tax are applicable to the transfer of assets; however, value added tax is generally not applicable to the transfer of real estate.

The purchaser of a business normally deducts the acquisition costs as operating expenses. Thus, there is a preference to structure the transaction as a purchase and acquisition of assets so that the purchaser can increase the depreciation basis, i.e. the net book value of the depreciable assets, by the difference between the purchase price paid and the book value of the assets (so-called “step-up”).

Usually, the accomplishment of the transfer of a business by way of a transfer of its assets is more complex since it requires that one identify the assets belonging to such business and ensure that all such assets are validly transferred. In a purchase and acquisition of assets, the purchaser may choose the assets to be purchased and acquired, while in a purchase and acquisition of shares the purchaser has to accept all assets and liabilities owned by the respective entity, regardless of whether he is aware of such assets and liabilities. Thus, a share deal bears the risk of assuming undisclosed liabilities.

Another aspect that might be relevant in determining the structure of the transaction is related to permits. Some businesses require permits that are either tied to the business itself or to its owner. While the ones tied to the business usually are transferred together with the assets of the business, the permits tied to the owner are not transferred in such case. Thus, the purchaser will have to apply for new permit(s). This issue does not arise in a purchase of shares since the owner of the business, i.e. the entity owning the assets forming the business, does not change.

If the purchase and transfer of assets qualifies as the transfer of a "Going Concern" (*"Fondo de Comercio"*), Argentine Law provides for a procedure addressed to limit the liabilities assumed by the purchaser of the Going Concern.

Although the legislation does not explicitly define a Going Concern, it describes the following elements as comprising a "Going Concern": installations, inventory, leaseholds, name and commercial logos, patronage, patents, trademarks, drawings and industrial models, honorary distinctions; and all others rights derived from the commercial and industrial or artistic property. In other words, the Law is applicable when (i) the assets transferred will enable the purchaser to continue carrying out, substantially in the same manner, the same business that was carried out by the seller, and (ii) due to the transfer the seller will not be able to continue performing its business in substantially the same manner that was carried out prior to the transfer.

Since the description above is admittedly vague, Argentine scholars and case law have interpreted that the list of features that comprise a Going Concern is not exhaustive, and may comprise any other assets that are part of the business unit that is subject to the transfer. There are, however, certain exceptions that are considered to be excluded from the scope of the Law such as in rem rights on real estate and agreements, which have specific procedures that must be followed in order for them to be transferred (e.g., a public deed and the appropriate registration in the cases of real estate, etc.).

The legislation applicable to the transfer of a Going Concern (i) provides the seller's creditors with the opportunity to obtain a judicial attachment for a certain limited period of time, and (ii) entitles the purchaser to receive the assets included in the Going Concern, limiting the purchaser's liability in connection with the transferred assets with respect to hidden liabilities or contingencies, except for the ones related to the transfer of the personnel.

Although there is joint and several liability as between purchaser and seller for the fiscal debts that have been determined prior to the moment of the transfer, it is possible to limit such liability with respect to the fiscal debt that remains to be determined, as described in more detail below.

The transfer of the assets composing the Going Concern should be executed according to a specific procedure established under the law in order to have effect vis-à-vis third parties, as well as to limit the purchaser's liabilities, as will be described further. Such procedure consists of the following steps:

(i) the seller shall provide the purchaser with a letter indicating the outstanding debt, names and addresses of the creditors, and debt amounts and respective due dates, if any;

(ii) the transfer of the Going Concern should be published for five days in the Official Gazette and in a well known newspaper in the area in which the Going Concern is located;

(iii) during the ten days following the last publication, the creditors that consider themselves to be affected by the transfer of the Going Concern are required to notify their claims to the address indicated by the seller in the above-referenced publications. The seller's creditors may claim the retention of the amounts of their credits and require the deposit of the corresponding amounts in a special account. These rights could be exercised by creditors identified in the letter mentioned in i) above, as well as by any omitted creditor holding an outstanding credit against the seller;

(iv) the purchaser shall retain the sums necessary for the payment of the credits and shall deposit those amounts in a special account opened for this purpose. The amounts deposited should be retained for a 20-day period, during which the creditors need to obtain a judicial attachment;

(v) in no event may the price of the transfer be lower than the amount of the outstanding debt declared by the seller plus the amount resulting from the credits not declared by the seller but notified by the seller's creditors according to iii) above;

(vi) the definitive sale document for implementing the transfer of the Going Concern shall be executed upon expiration of the term granted to the creditors to challenge the transfer, or once the 20-day period has elapsed with respect to such amounts that have not been subject to a judicial attachment. Within ten days following the execution of the definitive transaction document, such document shall be registered before the Public Registry of Commerce; and

(vii) additionally, the provisions and special formalities required by applicable law for the transfer of certain assets (e.g., the transfer of real estate requires a public deed, and the transfer of trademarks requires the filing of certain documents before the Office of Trademarks, etc.) should also be complied with.

It is important to point out that in the event the entire procedure described above is not followed, the purchaser shall be jointly and severally liable with the seller for any liabilities of the seller in connection with the transferred assets, up to the price of the transfer.

2. Distinction between Sale and Transfer in Rem

Argentine Law distinguishes between the sale of assets (i.e. obligation to transfer) and the perfection of the transfer of ownership, as the transfer of ownership generally requires delivery of the assets and/or registration of the transfer with an oficial register. However, an invalid or null agreement creating the obligation to transfer assets may not be validly cured by registration.

If assets are to be sold and transferred in multiple jurisdictions, it is possible to address the sale in a single master purchase agreement while transferring the assets in the respective jurisdictions.

3. Regional Differences

Since the essential rules applicable to the sale and transfer of assets are part of Argentine federal law, there are no regional differences as regards the legal requirements applicable to an asset transfer within Argentina.

4. Acquisition by Foreigners

As a general rule, foreigners receive the same legal treatment as locals. However, special requirements have to be met in certain industries, such as the armament industry. In addition, purchase of land located next to the international border or acquisition of a controlling stake in a company that owns land located therein requires a special permit from the federal government. Last, the Province of Corrientes has recently enacted an amendment to its Constitution providing for certain restrictions on the purchase of land by foreign nationals or companies.

5. Public Registers, Records and Databases

In Argentina, no central institution maintains all relevant information in connection with an asset transfer. Each Province has a register of real property. Information as to real property, including ownership and encumbrances, can be obtained from these registries. An inspection of the Real Property Register does not require the declaration of a qualified interest by the interested party.

In addition, there are various registries for certain movable assets, such as automobiles, machinery, etc. and for intellectual property and utility and design patents.

6. Purchase Price Requirements

The parties are free to determine the purchase price, provided it is not substantially below market value. The price may be stated in any currency; however, the ability to perform obligations payable in non-Argentine currency will be subject to the exchange and transfer regulations and interpretation of such regulations in effect at the time of payment. The same will apply to the ability of any person to remit out of Argentina the proceeds of sale and transfer of assets.

An allocation of the purchase price to individual assets or groups of assets is recommendable for tax and accounting purposes.

B. Tangible/Movable Assets

1. Characteristics as to:

a) Language of Documentation. The sale and transfer documents regarding tangible assets may be drafted in any language. Bilingual documents are permitted. A translation will be required if the transfer must be filed with public authorities. However, if transfer of the assets needs to be registered with a public register (for example, if it qualifies as the transfer of a Going Concern), a translation into Spanish may be required as well as a special registration form filled out in Spanish. Granting of rights concerning real estate always requires a Spanish document.

b) Form of Documentation. As a general rule, the transfer of tangible assets must be memorialized in writing. Notarization of the sale and purchase agreement might be required for certain assets or if the transfer qualifies as the transfer of a Going Concern.

The sale and transfer documents may be executed outside Argentina. Signing in counterparts is permissible, provided (i) there are as many counterparts as parties, and (ii) each party is furnished with a counterpart executed by the other parties.

c) **Specification of Assets.** As a general rule, the assets to be transferred must be described in detail in the transfer agreement to such an extent that a third party would be able to distinguish the assets from any other non-transferred assets (principle of identification). In order to comply with this, the use of asset lists (or schedules) is advisable but not mandatory. A specification by category or location is sufficient, provided that identification is possible without recourse to any legal evaluation.

If and to the extent that the asset specification is insufficient, the assets will not be transferred and will remain with the seller.

2. Administrative, Corporate and Other Approvals

As a general rule, the transfer of tangible assets does not require special governmental or administrative approvals. However, exceptions might apply with regard to special categories of assets (e.g., certain weapons, dangerous substances). In addition, certain transfers may require the approval of the Antitrust Authority. Non-compliance will invalidate the transfer.

Please note that Argentine Law requires that certain transactions that exceed a specified threshold must be submitted for prior review and approval of the Antitrust Authority as a condition for the transaction to be effective.

The transactions subject to review and approval include the transfer of assets when the business volume of the target company and the purchaser, on an annual basis, exceeds ARS 200 million in aggregate (approximately USD 68 million). However, certain exceptions apply.

The transactions subject to review will only be recognized as valid transactions among the parties and vis-a-vis third parties upon their review and approval by the Antitrust Authority.

Notice of any of the transactions subject to prior review and approval must be filed with the Antitrust Authority (i) prior to consummation of the transaction; or (ii) within "one week" from the earlier of the execution of the respective agreement, the publication of a tender offer or exchange offer, or the actual acquisition of a controlling interest.

The failure to notify the Antitrust Authority of any transaction subject to review and approval within the specified periods is punishable by fines of up to ARS 1 million (approximately USD 340,000) per each day notice is delayed.

As a general rule, the approval of any corporate body is not required, unless otherwise provided for in seller's and/or purchaser's articles of association or partnership agreement. If the seller is a stock corporation or a limited liability company, the approval of its shareholders' meeting might be required if the assets to be transferred form a substantial part of seller's core business, even if not expressly required in the articles of association or partnership. Non-compliance may invalidate the transfer.

The transfer of encumbered assets or of assets used as collateral does not require the security holder's approval per se, but all liens and rights will be transferred ipso facto to the purchaser. However, agreements creating liens typically specify the need for security holder approval to transfer the collateral. In all cases, transferor has the legal duty to inform the purchaser of all existing liens and rights on the assets to be transferred.

3. Filing Requirements

As a general rule, transfer of tangible assets does not require special filings. However, (i) certain types of tangible assets (such as automobiles) require a filing with public authorities or registrations, and (ii) if the transfer qualifies as the transfer of a Going Concern, registration is required.

4. Automatic Transfer of Encumbrances

As a general rule, encumbrances regarding tangible assets automatically transfer to the purchaser. In particular, pledged assets remain pledged. However, this rule does not apply where the purchaser acquires the assets in good faith, has paid the purchase price, and the related encumbrance is not registered with the public register (bona fide principle).

C. Real Property

1. Characteristics as to:

a) Language of Documentation. As a general rule, the sale and transfer documents regarding real property must be drafted in Spanish since they must be filed with the real property register. However, a certified translation into a foreign language may be attached to the Spanish documents. Documents that do not need to be registered with the real property register (such as a preliminary sales agreement) may be drafted in any language.

b) Form of Documentation. Regarding transfer of title to real property, a public deed in the Spanish language executed by the parties and a public notary is mandatory. The public deed may be executed overseas but a transcription of the deed by an Argentine public notary is required in order for the public deed to be registered with the real property register. In all cases, in order for a public deed executed overseas to be valid in Argentina, local requirements concerning a real property transfer must be complied with.

Signing in counterparts is not permissible.

c) Specification of Assets. A detailed description of the real estate as provided by the real property register is mandatory to effect the transfer of real property.

2. Administrative, Corporate and Other Approvals

As a general rule, the transfer of real property does not require special governmental or administrative approvals. However, transfer of a piece of real property located next to the international border requires prior authorization from the federal government. Please refer to B, 2 in connection with the Antitrust Authority's approval.

As a general rule, the approval of any corporate body is not required, unless otherwise provided for in seller's and/or purchaser's articles of association or partnership agreement (such provisions are customary with respect to real property). If the seller is a stock corporation or a limited liability company, the approval of its shareholders' meeting might be required if the assets form a substantial part of the seller's core business, even if not expressly mentioned in the articles of association or partnership. Failure to comply with this provision may invalidate the transfer.

In the event the real property is encumbered with mortgages, land charges or usufruct rights, the transfer will generally not be subject to the approval of the security holders who continue to be secured following the transfer, due to the fact that all encumbrances and liens automatically transfer to the purchaser. However, usually agreements creating mortgages or liens specify the need for security holder approval to transfer the real estate. In this case, if the security holders' approval is withheld, then the transfer will not be effective vis-à-vis the non-consenting security holder. Should this be the case, in some jurisdictions within Argentina, the purchaser will be liable to the security holder for the total amount secured, even if it exceeds the value of the collateral.

3. Filing Requirements

The transfer of real property must be registered with the Real Property Register and is not valid until such registration takes place. The relevant filings must be made by the public notary in charge. In addition, the public notary is obliged to provide the tax authorities with information regarding the transfer.

4. Automatic Transfer of Encumbrances

All registered encumbrances on real property remain valid after the transfer of the real estate. The waiver of encumbrances requires a notarized form (public deed).

5. Automatic Transfer of Lease Agreements

Lease agreements are automatically transferred to the purchaser upon purchase of the real property. Neither the seller nor the purchaser may terminate the lease agreement in a sale of real property. However, the tenant may terminate the lease if the first six months have elapsed and the tenant pays a penalty amounting to one and a half month's rent (if termination is effective before the first year has elapsed) or one month's rent (if termination is effective after the first year has elapsed).

D. Contracts

1. Characteristics as to:

a) Language of Documentation. As a general rule, the transfer of contracts may be memorialized in any language. Bilingual documents are permitted. Since such documents do not need to be filed with public authorities, a translation into Spanish is not required. However, if the contract to be transferred has been executed by means of a public deed, then a public deed will be required to transfer the said contract, which must be drafted in Spanish. In addition, if the transfer qualifies as the transfer of a Going Concern, certain documents involved in the transaction will have to be drafted in Spanish.

b) Form of Documentation. As a general rule, the written form is required to transfer contracts. In addition, delivery of the document assigned to the purchaser is necessary for the transfer to be effective. If the contract to be transferred has been executed by means of a public deed, then a public deed will be required to transfer the said contract. In addition, if the transfer qualifies as the transfer of a Going Concern, certain documents involved in the transaction will have to be notarized.

The transfer documents may be executed outside Argentina. Execution in counterparts is permissible.

c) Specification of Contracts. A general or generic description is sufficient to transfer the contracts, provided the original counterpart of the agreements is delivered to the purchaser.

2. Administrative, Corporate and Other Approvals

As a general rule, the transfer of contracts does not require special governmental or administrative approvals, except (i) if the government or any of its agencies is party to the related agreement and (ii) execution of the contract requires a special governmental or administrative approval. Please refer to B, 2 in connection with the Antitrust Authority's approval.

The approval of any corporate body is basically not required unless otherwise provided for in seller's articles of association or partnership agreement. For further details, please refer to B, 2 above.

As a general rule, the counterparty's consent is not required for the transfer to be effective, except if specifically required in the contract to be transferred. If the counterparty's consent is required and is withheld, then the transfer will be void. In addition, if the counterparty's consent is not required as a condition of validity of the transfer but is nevertheless given, this will imply that the counterparty has waived his right to oppose to the transfer before the seller. Last, if the counterparty's consent is not required for the transfer to be valid but is not given, then the seller will remain obliged vis-à-vis his counterparty according to the contract transferred.

In addition, consent of the other parties will be required if the nature of the contract requires so (agreements intuitu personae).

3. Automatic Transfer of Contracts (Other than Lease and Employment Agreements)

There are there no other contracts that automatically transfer to the purchaser in the event of an asset deal other than lease and employment agreements.

4. Filing Requirements

As a general rule, the transfer of contracts does not require a filing or registration with public authorities or registers or databases. However, if the transferred contract has been filed with any public authority or registered with any public register or database, then filing and/or registration will be required.

5. Treatment of Existing Contractual Claims and Obligations

Claims and obligations arising from the transferred contract automatically transfer to the purchaser. It is customary to agree upon indemnification clauses.

6. Warranty Claims Resulting from Events prior to Transfer

As a general rule, the transfer of a contract also includes the transfer of any claims and obligations related to such contract. Please refer to A, 1 for further details regarding the transfer of a Going Concern; the potential exposure resulting from such a transfer is customarily covered by representations and warranties and/or indemnifications.

E. IP Rights

1. Characteristics of Intellectual Property Rights (e. g., Trademarks, Patents, Utility Models, Domain Names,) ("*IP Rights*") as to:

a) Language of Documentation. As a general rule, the sale and transfer documents regarding IP Rights may be drafted in every language. In case of registered IP Rights (e.g., trade marks, patents, design patents, domain names) a translation into Spanish may be needed for filing purposes; bilingual documents are permitted. However, the required registration form must be in Spanish.

b) Form of Documentation. As a general rule, the transfer of IP Rights is required to be in writing.

The sale and transfer documents may be executed outside Argentina. Signing in counterparts is permissible, provided (i) there are as many counterparts as parties, and (ii) each party is furnished with a counterpart executed by the other parties.

For registration purposes of IP Rights, a special form must be filed in Spanish and the signatures therein must be notarized.

c) Specification of IP Rights. The principle of identification (see B, 1, c above) also applies to the transfer of IP Rights, which means they must be specified sufficiently. In order to comply with these requirements the use of lists (or schedules) is advisable but not mandatory.

2. Administrative, Corporate and Other Approvals

As a general rule, the transfer of IP Rights does not require special governmental or administrative approvals. Please refer to B, 2 in connection with the Antitrust Authority's approval.

The approval of any corporate bodies is basically not required unless otherwise provided for in seller's and/or purchaser's articles of association or partnership agreement. For further details, please refer to B, 2 above.

The transfer of encumbered IP Rights without the security holder's consent is not effective vis-à-vis the security holder.

3. Filing Requirements

If and to the extent the IP Rights to be transferred are registered in public registers, the change of ownership requires the filing with the relevant public registers to be effective vis-à-vis third parties. However, such registration is merely of a declaratory nature and does not affect the validity of the transfer. In addition, if the transfer qualifies as the transfer of a Going Concern, the filing procedure detailed in C, 1 will have to be followed.

4. Applicable International (Multilateral) Agreements or Treaties

Argentina participates in the TRIPS Agreement and in the Paris Convention for the Protection of Industrial Property. In addition, Argentina and Germany signed the Treaty of Rome, the Berne Convention and the Universal Convention.

F. Receivables

1. Characteristics as to:

a) Language of Documentation. As a general rule, the transfer of receivables may be drafted in every language. Bilingual documents are permitted. Since there is no need for filing such documents with public authorities, a translation into Spanish is not required. However, if the underlying document is a public deed, then a public deed (in Spanish) will be required to transfer the related receivables. In addition, if the transfer qualifies as a transfer of a Going Concern, certain documents will have to be drafted in Spanish.

b) Form of Documentation. As a general rule, the written form is required to transfer receivables. If the underlying document is a public deed, then a public deed will be required to transfer the receivables. In addition, if the transfer qualifies as the transfer of a Going Concern, certain documents will have to be notarized.

The transfer documents may be executed outside Argentina. Execution in counterparts is permissible.

c) Specification of Receivables. The principle of identification (see B, 1, c above) also applies to the transfer of receivables, which must be specified sufficiently. In order to comply with such requirements it is recommendable to list the receivables to be transferred in schedules to the asset transfer agreement, specifying the underlying legal relationships and the outstanding amount of the relevant receivables.

2. Administrative, Corporate and Other Approvals

As a general rule, the transfer of receivables does not require special governmental or administrative approvals. Please refer to B, 2 in connection with the Antitrust Authority's approval.

Approval of any corporate body is generally not required unless otherwise provided for in seller's and/or purchaser's articles of association or partnership agreement. For further details, please refer to B, 2 above.

The validity of the transfer is not subject to the approval of the debtors, provided that the underlying agreement does not state otherwise.

3. Filing Requirements

Regarding the transfer of receivables, no filings with public authorities or registrations into public registers or databases are required. The notification of the transfer to the debtors is required, since as long as the debtors are not aware of the transfer, payments on the receivables would still be made to the former owner of the receivables.

G. Liabilities

1. Characteristics as to:

a) Language of Documentation. As a general rule, the sale and transfer documents regarding the transfer of liabilities may be drafted in every language. Bilingual documents are permitted. However, if the underlying document is a public deed, then a public deed (in Spanish) will be required to transfer liability. In addition, if the transfer qualifies as the transfer of a Going Concern, certain documents will have to be drafted in Spanish.

b) Form of Documentation. As a general rule, the written form is required to transfer liabilities. If the underlying document is a public deed, then a public deed will be required to transfer the said liability. In addition, if the transfer qualifies as the transfer of a Going Concern, certain documents must be notarized.

The transfer documents may be executed outside Argentina. Execution in counterparts is permissible.

c) Specification of Liabilities. The principle of identification (see B, 1, c above) also applies to the transfer of liabilities, which must be specified sufficiently. In order to comply with such requirements, it is recommendable to list the liabilities to be transferred in schedules to the asset transfer agreement, specifying the underlying legal relationships and the outstanding amount of the relevant liabilities.

2. Administrative, Corporate and Other Approvals

As a general rule, the transfer of liabilities does not require special governmental or administrative approvals. Please refer to B, 2 in connection with the Antitrust Authority's approval.

The approval of corporate bodies is basically not required unless otherwise provided for in seller's and/or purchaser's articles of association or partnership agreement. For further details, please refer to B, 2 above.

As a general rule, creditor's consent is not required for the transfer to be effective, except if specifically required in the underlying document. If the creditor's consent is required and withheld, then the transfer will be void. In addition, if the creditor's consent is not required for the transfer to be valid but is nevertheless given, this will imply that the creditor has given up his right to make any claim against the seller in connection with the liability transferred. Finally, if the creditor's consent is not required for the transfer to be valid but is not given, then the seller will remain obliged vis-à-vis his counterparty in connection with the liability transferred.

In addition, consent of the other parties will be required if the nature of the liability requires so (obligations intuitu personae).

3. Filing Requirements

In addition, if the transfer of liabilities qualifies as the transfer of a Going Concern, the filing procedure detailed in C, 1 must be complied with.

4. Purchaser's Liability for:

a) Tax Obligations. Although there is joint and several liability between purchaser and seller for the tax liability that has been determined at the moment of the transfer, it is possible to limit such liability with respect to the taxes accrued but not assessed, provided a notice to the Argentine Tax Authority with respect to the transfer is sent at least 15 days before the transfer takes place. Therefore, it is highly advisable to send such notice within the 15-day period in order to limit the purchaser's liability.

The tax liability shall be considered assessed when:

(i) it has been determined by the taxpayer by filing a tax return; or

(ii) it has been determined by the tax authorities on the basis of information provided by the taxpayer or by an assessment procedure ending in a notice of deficiency.

According to the Tax Procedure Law, the purchaser of assets and liabilities of a company shall be personally and jointly liable with the seller with regard to the tax liability already assessed at the time of the transfer, in the event the seller fails to pay it.

With regard to the tax liability arising from provincial taxes, in general, regulations similar to the federal regulation have been adopted by the provincial tax codes.

b) Environmental Contamination. All environmental liabilities (even those arising from periods prior to the acquisition) are transferred to the purchaser, who will be jointly and severally liable with the seller.

c) Products Sold or Services Rendered by the Seller to Third Parties. Please refer to A, 1 regarding the liability arising from the transfer of a Going Concern.

5. Automatic Transfer of Other Liabilities

No other liability transfers automatically due to the acquisition of assets.

6. Contractual Protection as to 4 and 5 above

It is customary to include indemnification clauses in favor of the purchaser of assets in connection with (i) tax and environmental liabilities, and (ii) products sold or services rendered by the seller to third parties prior to the acquisition.

H. Employees

1. Transfer of Employees

According to mandatory Argentine law, all existing employment agreements pertaining to a business automatically transfer to the purchaser by operation of law. This does not apply if the transaction only involves selected assets that collectively do not form a distinct business unit.

As a consequence of the transfer, the purchaser becomes part of the employment agreement and is bound to its terms and conditions, as well as to any arrangements stipulated between the seller and the affected employee.

The seller will remain liable vis-à-vis the employees as regards obligations arising from the employment relationships that were incurred prior to the date the transfer is effective. On the other hand, the purchaser will be liable vis-à-vis the employees as regards obligations arising from the employment relationships that were incurred both prior to and after the effective date of the transfer.

As a general rule, the transfer does not require the employees' consent and therefore employees cannot claim to have been dismissed as a consequence of the transfer. However, if the transfer affects the working/economic conditions of the employees, the employees may put themselves in a situation of a constructive dismissal and may have a claim for severance.

2. Approval of Works Council, Trade Union or Other Institutions

The transfer of a business by way of transfer of the individual assets does not trigger co-determination rights of the works council.

3. Contractual Protection as to Labor Issues

As a general rule, the transferor of the assets is liable for labor obligations until the transfer is effective or the purchaser takes control of the assets.

I. Tax Implications

1. Value Added Tax

Transfer of assets triggers the obligation to pay VAT. The regular VAT rate in Argentina amounts to 21%.

2. Real Property Transfer Tax

The transfer of real estate in Argentina does not trigger any real estate tax. However, if the seller of a real property is a natural person, then a 1.5% tax calculated on the purchase price is applicable.

3. Other Tax Issues

As a general rule, stamp tax is applicable to the asset transfer agreements. The stamp tax rate varies according to the jurisdiction; as a general rule we may state that the current rate is not higher than 4% of the purchase price.

J. Bankruptcy Law

1. Challenge of Asset Transfer in Case of Insolvency

Creditors of a bankrupted seller or purchaser may challenge the transfer provided that:

(i) the transfer had taken place within a two-year period before the bankruptcy is declared by a court;

(ii) insolvency of the seller or the purchaser is public by the time the transfer takes place; and

(iii) the transfer implies a damage to the purchaser's or seller's economic capability.

2. Acquisition of Assets that are Subject to Insolvency Proceedings

If the seller has been declared bankrupt by a court, then the court's approval is required in order to execute any kind of transfer of assets.

If the seller has been declared to be under '*concurso preventivo*' (similar to Chapter 11 bankruptcy under U.S. law) the court's approval will be required only in order to execute any kind of contract, among which the transfer of a Going Concern is included.

K. Timing and Costs

1. Timeframe of Asset Transfer

As a general rule, it may be said that registration of the transfer of assets may require up to seven months.

2. Costs of Asset Transfer

The stamp tax rate varies according to the jurisdiction; as a general rule, the current rate does not exceed 4% of the purchase price.

Notarization costs may amount to up to 3% of the transfer price.

L. Miscellaneous

1. Choice of Foreign Law

As a general rule, the sale of assets may be subject to foreign law. However, the formalities to transfer assets located in Argentina are always subject to Argentine law.

2. (International) Arbitration, Choice of Venue

International arbitration is always possible.

3. Other Distinctions, Characteristics

If the seller is an individual person and if he/she is married, the consent of his/her spouse is required for the transfer of assets whose transfer is registered. Without such consent, the transfer of the assets may be challenged by the non-consenting spouse.

M. Literature

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Australia

By *John Mollard* and *Jason Cornwall-Jones*

A. General Aspects

1. Asset Deal vs. Share Deal: Essential Considerations

There are a number of factors to consider when deciding whether to structure a sale of business transaction in Australia to be by way of an asset transfer or a share transfer. The key considerations for the parties are briefly set out below (and described in more detail later in this chapter).

<u>Stamp Duty</u>

In some jurisdictions of Australia there is stamp duty on the sale of unquoted securities (New South Wales, South Australia and the Australian Capital Territory). The duty has been abolished in all other jurisdictions.

In all jurisdictions there is (a) land rich duty payable on the transfer of 50% or more of the shares in a company whose land assets exceed a threshold percentage of total assets (except in Western Australia where a 90% level applies), and (b) stamp duty on the sale of certain assets.

<u>Goods and Services Tax (GST)</u>

GST (10%) is generally not chargeable on the sale of shares or the sale of a business if the business is sold as a going concern.

The sale of shares is an input taxed financial supply. Hence, no amount in respect of GST should be charged on the sale of shares. However, any GST amounts incurred on costs that relate to the sale of shares cannot be claimed back as input tax credits.

The sale of all of an entities' business assets can be treated as a GST-free supply of a going concern. If the relevant requirements (described below) are met, no amount of GST should be charged on the sale of the business assets, but any amounts of GST incurred on costs that relate to the sale of the business assets can still be claimed back as input tax credits.

For a sale of business assets to meet the requirements of a GST-free supply of a going concern:

- the supplier must supply to the recipient all of the things that are necessary for the continued operation of the enterprise; and

- the supplier must carry on, or will carry on, the enterprise until the day of the supply.
- The recipient of the supply must also be registered or required to be registered for GST and the supplier and the recipient must agree in writing that the supply is of a going concern.
- If the sale of business assets do not meet the requirements of a GST-free supply of a going concern, the supply will generally be a taxable supply and be subject to GST.
- It should be noted that if the asset being supplied as a taxable supply is a freehold interest in land, the margin scheme could be applied in calculating the GST amount payable on this taxable supply.
- Ordinarily, the amount of GST on a taxable supply is 10% of the value of the taxable supply. If the margin scheme applies, the amount of GST on the supply is 1/11 of the margin for the supply.
- The margin for the supply is the amount by which the total consideration for the supply exceeds the consideration for the acquisition of the freehold interest in the land in question. If the interest in the land was held prior to July 1, 2000, instead of using the consideration for the acquisition of the land, a margin scheme valuation, determined at July 1, 2000, may be substituted for this amount in calculating the margin.
- The margin scheme may only be applied in certain circumstances, e.g., the land was acquired by applying the margin scheme, and both the purchaser and the seller must agree in writing that the margin scheme is to apply to the supply of the land.

Roll Over of Tax Losses, Capital Gains and Depreciation and Other Tax Treatment

A sale of shares will generally be subject to capital gains tax for any gain realized by the seller.

If all of the shares in a company are purchased, the purchaser will usually acquire the historic tax assets and liabilities of the company. This means that the purchaser may benefit from tax attributes of the company (such as franking credits and tax losses), but may suffer the burden of prior period under-payments of income tax. Accordingly the purchaser will usually seek comprehensive tax warranties and a specific tax indemnity.

The ability to do this is dependent on whether a company is a subsidiary member of a consolidated group for income tax purposes. If so, the tax attributes of the company will remain with the "head entity" of the income tax consolidated group. The acquisition of a company (as opposed to assets) by a purchaser who is itself a member of an income tax consolidated group will allow for the value of the underlying assets to be "reset", based on the purchase price of the shares, adjusted for inherited liabilities and other characteristics.

A purchaser who is not a member of an income tax consolidated group may prefer an asset acquisition, as this will permit the purchaser to establish the value of such assets going forward. Otherwise, the purchaser will inherit the tax value of the assets to the seller as at the time of acquisition. As the seller would typically retain the historic tax attributes, assets and liabilities of the company, a purchaser will also seek a less comprehensive range of tax warranties and indemnities.

In contrast, in broad terms a seller may prefer a share sale rather than an asset sale where the seller has available capital gains tax relief (such as a 50% capital gains tax discount or ability to "rollover" the shares).

Ability to "Cherry Pick" Assets and Liabilities

A purchaser may not require all of the assets of a seller due to its key objectives, or following due diligence a purchaser may identify certain assets which it does not which to purchase. This is to be balanced with the desire of a seller to sell all of its business or be left with certain assets (which may be unsaleable in the future as separate assets, not forming part of a business).

Material Contracts

Certain key contracts may require the consent of the counter parties for a direct transfer. If those counter parties do not wish to provide that consent, and the relevant contracts do not contain change of control clauses, a transfer of shares may be the practical solution.

Preservation of Material Licenses or Authorizations

Depending on the nature of the operations of the business being acquired, it may possess certain governmental licenses or authorizations which relate to the entity, rather than the assets. Generally governmental licenses and authorizations are not transferable and therefore the purchaser of assets would have to make new applications. A purchaser of shares may or may not need to make a new application depending on the terms of issue of the license (i.e. change of control).

Deemed Redundancy of Employees

A transfer of employees from the seller to a purchaser where the employee does not receive "equivalent" terms of employment may trigger certain redundancy or severance payment obligations for the seller.

Usually a transfer of business undertaken as an asset transfer will involve greater detail in the documentation (to describe the assets being purchased and the allocation of a value to those assets for tax purposes) and potentially more complex formalities to register different types of assets transferred. A share transfer on the other hand can be easily documented by a single share transfer.

In Australia, the acquisition of a business by way of the transfer of shares is more common, but it will depend on the objectives of the purchaser and seller.

2. Distinction between Sale and Transfer in Rem

Conceptually, the jurisdictions within Australia do not generally distinguish between the sale (obligation to transfer) and the transfer in rem (fulfillment of the obligation to transfer).

Parties are able to contractually agree to the sale of the relevant business and provide separately for the actual mechanics of the transfer, but the agreement on sale must be sufficiently clear and certain to allow a court to objectively determine what the transfer process ought to be.

If desired, one can draft a master agreement regarding the sale/purchase and separate local agreements regarding the transfer of particular individual or groups of assets (including those in different jurisdictions).

3. Regional Differences

Generally the essential rules applicable to the sale and transfer of assets are the same across the different States and Territories as they are covered by the common law principles.

Different legislation, however, applies in different States and Territories with respect to certain aspects of the transfer of assets, such as with respect to the transfer of real property, land rich and general stamp duty and the sale of goods. But this different legislation operates on similar general legal principles and there are generally only minor differences in its application across the various jurisdictions (for example, different stamp duty rates apply in different States and Territories in Australia).

4. Acquisition by Foreigners

The acquisition of interests in Australian shares or businesses by foreign entities is regulated primarily through a regime established under the Foreign Acquisitions and Takeovers Act 1975 (FATA), as supplemented by Australian government policy. That regime is administered by the Australian Treasurer. In practice, the Treasurer acts through the Foreign Investment Review Board (FIRB).

Under the FATA, acquisitions of a business above a certain monetary threshold by foreign persons, acquisitions by foreign governments or those in certain sensitive industries are required to be notified to FIRB on a compulsory basis.

For non-US investors, FIRB notification and approval is required for a foreign persons to acquire a substantial interest in an Australian business (shares or assets) where the investment values the gross assets of the target at more than AUD 100 million. For US investors, the threshold is AUD 913 million, however a lower threshold of AUD 105 million applies where the US acquisition is involved in a prescribed sensitive sector or where the acquiring entity is controlled by the US government. Please note that these thresholds change from time to time. The above thresholds are current as of January 1, 2008.

The prescribed sensitive sectors include business activity in any of the following areas:

- media;
- telecommunications;
- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to or from, Australia);
- the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defense Force or other defense forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

For these purposes:

- a 'foreign person' is a person who is not ordinarily resident in Australia or a corporation where persons who are not normally resident in Australia control that corporation;
- a person holds a 'substantial interest' if they alone (or together with their associates) is in a position to control not less than 15% of the voting power of the corporation or holds interests in not less than 15% of the issued shares in the corporation; and
- two or more persons hold a 'substantial interest' if they (together with their associates) are in a position to control not less than 40% of the voting power of the corporation or hold interests in not less than 40% of the issued shares in the corporation.

Subject to certain exceptions, the acquisition of an interest in urban land in Australia by foreign persons is caught by the FATA. Urban land is generally described as any land in Australia other than land that is used wholly and exclusively for carrying on a business of primary production. There is no minimum monetary threshold in relation to the transfer of urban land to a foreign person. Any transfer will require notification to and the approval of the Treasurer unless exemptions apply. Some of the main exempted acquisitions are over:

- developed commercial property valued at less than AUD 100 million where it is non-heritage listed, or less than AUD 913 million (for US investors); and
- developed commercial property where the property is to be used immediately and in its present state for industrial or non-residential commercial purposes.

FIRB has wide powers to prohibit foreign investment proposals and to order divestiture or unwinding of foreign investment arrangements in respect of Australian companies and businesses if they are considered contrary to the national interest.

An agreement in respect of a proposed acquisition which requires FIRB clearance will contravene the FATA unless FIRB clearance has been obtained prior to execution of the agreement or the agreement is expressed to be conditional on FIRB clearance.

5. Public Registers, Records and Databases

There is no central register containing information on all aspects of a business. Different government departments are mandated to regulate various aspects of business in Australia. Save in respect of certain information that must be filed with the Australian Securities and Investments Commission (ASIC), there is generally no obligation on parties to register with the various authorities, but it is typically useful to ensure priority. The main public registers are as follows:

ASIC

Corporate information concerning a seller (if it is a company) can be obtained from ASIC through company searches which show basic details such as (i) a company's share capital structure (ii) the directors and shareholders (iii) a company's registered business address and (iv) any registered charges over the company's assets.

<http://www.asic.gov.au>

Land Titles

Information concerning real property can be obtained from the land titles office, or through online title searches. The property title searches will reveal the ownership of the property and any registered encumbrances over the property, including any registered caveats, easements or covenants over the property.

Environmental Information

Each State in Australia has a register of contaminated sites maintained by its respective Environment Protection Authority (EPA). Information regarding environmental licenses, clean up and enforcement orders is also available from the EPAs and online registers where available.

There is an online National Pollutant Inventory that contains information regarding emission estimates for 93 toxic substances from 4,000 facilities.

<http://www.npi.gov.au>

Planning

Planning certificates in relation to land can be obtained in Australia from the relevant local government and/or state Planning Department. Planning certificates typically identify the zoning of the land, the environmental planning instruments which apply to the land and in some States also specify whether there are development permits and ongoing conditions regarding the use of the land.

IP Australia

Information concerning registerable intellectual property rights such as patents, designs, plant breeder's rights and trade marks are publicly available on the website of IP Australia. <http://www.ipaustralia.gov.au>

Other Permits and Licenses

Other public registers exist for certain licenses and permits issued by the governmental departments, including those as relating to mining tenements, water licenses, indigenous sites/objects, non indigenous heritage sites, Australian financial services licenses and NEMMCO registrations.

6. Purchase Price Requirements

The parties are free to determine the purchase price to be paid in connection with an asset deal. There is no prescribed minimum price or currency in which the purchase price must be paid.

There is no general requirement to allocate the purchase price to groups of assets or individual assets, save that where stamp duty applies the parties must be able to provide evidence of the value of the relevant assets the subject of the duty by an allocation of the purchase price (expressed in the contract or otherwise).

For income tax purposes, where a "lump sum" is paid in consideration for the acquisition of a number of assets, any subsequent allocation must be "reasonable", having regard to market values, contemporaneous documentation and other information relevant to the acquisition process. In general, a purchaser will usually prefer to allocate the purchase price to assets whose cost is either immediately deductible or depreciable, whereas a seller may prefer to allocate the price to assets that are subject to capital gains tax (particularly where capital gains tax relief, as above, is available).

As mentioned in A, 4 above FIRB or the Australian Competition and Consumer Commission (ACCC) may impose undertakings on a seller or purchaser in relation to the sale of assets or shares that they review. Compliance with those undertakings will be necessary in order to obtain the relevant approval or consent from these government bodies. This is discussed further at B, 2 below.

B. Tangible/Movable Assets

1. Characteristics as to:

a) **Language of Documentation.** The sale documents regarding tangible assets may be drafted in any language. English is the usual language, but it is not mandatory.

The documents can be executed in two languages, preferably with a nominated language prevailing in case of any inconsistency.

b) Form of Documentation. In New South Wales, Queensland, South Australia, Victoria and the Australian Capital Territory, there are no special formalities for the enforcement of a contract of sale of goods.

In Tasmania, Western Australia and the Northern Territory there is a formal requirement that a contract for the sale of goods of a certain value shall not be enforceable by action unless the purchaser accepts part of the goods sold and actually receives them, gives something in earnest to bind the contract or in a part payment, or a note or memorandum in writing of the contract is made and signed by the party to be charged or that party's agent (compare Sale of Goods Act 1923 (Tas), ss 8, 9; Sale of Goods Act 1896 (WA), ss 3, 4; Sale of Goods Act 1895 (NT), s 8). A contract for the sale of assets would constitute a sufficient written note or memorandum.

Non-compliance with the relevant statutory provisions would not render a contract void, but would make it unenforceable at the suit of a party seeking to enforce it. Accordingly, it is strongly advisable that all sale of assets be recorded in the form of written contract. But the contracts do not need to be notarized.

Documents recording the transfer of tangible assets can be executed outside Australia. The parties can agree to execute counterparts, and should clearly specify in the contract that this is permitted.

c) Specification of Assets. The tangible assets being transferred may be generally described such as "all tangible assets relating to the [Business]" (as long as the business is clearly identifiable) or they may be identified by reference to certain categories or location, but in each case the tangible assets to be transferred must be clearly described to allow them to be objectively identified.

There is no requirement for the parties to list assets being transferred in separate schedules. In practice, parties will usually identify each material tangible asset, where capable of specific identification.

2. Administrative, Corporate and Other Approvals

The transfer of tangible assets normally do not require any special governmental or administrative approvals, unless they are subject to notification to FIRB (referred to in A, 4 above) or involve any anti-competitive issues under the Trade Practices Act 1974 (Cth) in which case the ACCC's clearance may be required. In addition, certain restricted assets (e.g., weapons or dangerous substances) may also be subject to special rules in relation to their transfer. The ACCC may impose undertakings on a seller or purchaser in relation to the sale of a business if it would lead to a substantially lessening of competition in a market. Compliance with those undertakings will be necessary in order to obtain the relevant approval or consent from these government bodies.

The constitution or articles of association of the seller and purchaser will usually set out the corporate actions required of the seller or purchaser for the proposed transaction.

The transfer of assets may require the approval of shareholders of a listed company in certain circumstances.

Whether approval of a security holder is required will depend on the terms of the agreement creating the encumbrance. If under the terms of the agreement the seller must obtain prior approval of the security holder before being able to deal with the assets, then such consent should be obtained.

3. Filing Requirements

The transfer of tangible assets generally does not require any special filings with public authorities or databases.

4. Automatic Transfer of Encumbrances

Generally, encumbrances relating to tangible assets automatically transfer to the purchaser if the purchaser has notice of the same. This means that the assets pledged will remain pledged and assets which are subject to retention of title clauses will remain subject to such clauses.

However, bona fide purchasers for value may have a superior title to these tangible assets as compared with the encumbrancer if the encumbrance is unregistered and the bona fide purchaser did not have knowledge of the encumbrance.

C. Real Property

1. Characteristics as to:

a) Language of Documentation. Documentation regarding the transfer of real property is generally drafted in English. Many documents regarding the transfer of real property will need to be lodged at the applicable State or Territory revenue office for stamp duty purposes and at the land titles office for registration. Such documents will often need to be presented in a prescribed form and may not be accepted in languages other than English.

b) Form of Documentation. Each Australian State and Territory has legislation which provides that no interest in land can be created or disposed of except by writing signed by the transferring party or by its authorized agent (compare Conveyancing Act 1919 (New South Wales), s 54A; Property Law Act 1974 (Queensland), s 59; Law of Property Act 1936 (South Australia), s 26; Conveyancing and Law of Property Act 1884 (Tasmania), s 36; Instruments Act 1958 (Victoria) s 126; Property Law Act 1969 (Western Australia), s 34(1) Civil Law (Property) Act 2006 (Australian Capital Territory), s 201 (1)(a); Law of Property Act 2000 (Northern Territory), s 10(1)(a).

Such instruments must generally be in the form of a deed. There are some exceptions to the requirement for a deed. For example, short term leases and instruments which are registered on title (which instruments are deemed to take the form of a deed on registration).

Documents recording the transfer of real property can be executed outside Australia, but may need to be brought into Australia for stamping and registration at the applicable revenue office and land titles office respectively.

The parties can agree to execute counterparts, and if so, should clearly specify in the contract that this is permitted. If executing counterparts, ideally the contract should address at what point the agreement becomes binding, whether on execution or exchange.

c) Specification of Assets. Where real property is the subject matter of a contract, the real property must be described with sufficient particularity so that the intention of the parties may be objectively discerned with certainty. The degree of detail that is required to achieve this objective may range from a broad description of particular real property owned by a party at any given time, to the inclusion of detailed schedules of documents, title details or plans. For the avoidance of doubt, it may be preferable to err on the side of providing more rather than less detail. Instruments that are required to be registered on title will need to describe the relevant property by reference to its title details and possibly a properly surveyed plan.

2. Administrative, Corporate and Other Approvals

The transfer of real property does not generally require governmental or administrative approval. However, there are some important exceptions. Such exceptions include transfers of land to foreign persons covered by FATA (see Section A, 4 above). Land may also be reserved for certain purposes or use by specific entities. Approval for the transfer of such land, or rights relating to such land, may be required. There are also some types of property rights, including some types of easement, that can only be held by authorized entities. Failure to obtain the necessary approvals or authorizations may render a transfer of the land or interests in land described above void, or cause the property right to fail or revert to the Crown.

In the case of a transfer of a real property interest other than the freehold (such as a lease), it may be necessary to obtain the consent of the owner of the freehold (i.e. the lessor) to such transfer. Leases in Australia commonly include a restriction on assigning the lease without the consent of the lessor. It is also not uncommon for a lease to restrict a change in control in the shareholding of a lessee. This means that when acquiring a business, it is important to the check the provisions of relevant leases, whether acquiring the assets of a company or acquiring the shares. Failure to obtain required consents to an assignment of a lease or a change in control of the lessee may constitute a breach of the lease entitling the lessor to terminate the lease.

In the case of a transfer of a lease or other interest in real property, if the freehold is subject to a mortgage, it may be necessary to obtain the consent of the freehold mortgagee, particularly if the transfer is required to be registered on title. If the lease itself is subject to a leasehold mortgage, whether approval of the security holder is required will depend on the terms of the agreement creating the encumbrance. If under the terms of the agreement the seller must obtain prior approval of the security holder before being able to deal with the assets, then such consent should be obtained.

3. Filing Requirements

Transfers of real property generally need to be registered with the land titles office in the applicable State or Territory. There are some types of interest in land that do not need to be registered on title, meaning a transfer of such interest need not be registered. For example, in Victoria, the interest of a tenant in possession is often not registered on title.

4. Automatic Transfer of Encumbrances

If real property in Australia is subject to an encumbrance, that encumbrance will survive the transfer unless the right in question is only personal in nature (as opposed to an interest that touches and concerns the land in question), or is expressed to terminate on transfer. However, a transferee of freehold property will usually require any freehold mortgage of the transferor to be discharged at or prior to settlement of the transfer.

5. Automatic Transfer of Lease Agreements

A leasehold interest is considered to "run with the land" subject to the lease, which means the lease is binding on successive owners of the freehold. This means a transferee of a freehold interest in real property will be subject to the leasehold interest without the need for any documentation. However, on the basis that a lease may include rights and obligations that are personal in nature that do not "run with the land", it is not uncommon for a transferee of a freehold interest in real property to enter into a deed with a lessee under which each party covenants to comply and perform with their respective obligations under the lease.

A lessee would not ordinarily be entitled to terminate a lease following a transfer of the freehold unless specifically provided for in the lease, which would be uncommon.

D. Contracts

1. Characteristics as to:

a) Language of Documentation. The sale documents regarding the transfer of contracts may be drafted in any language. English is the usual language, but it is not mandatory.

The documents can be executed in two languages, preferably with a nominated language prevailing in case of any inconsistency.

b) Form of Documentation. The transfer of contracts does not require a special form of documentation. However, the requirements for it to be in written form or other procedural formalities may be contained in the original contracts. For example, there may be provisions requiring any amendments, assignments or novation of the contracts to be in writing. In addition, there may be a requirement to obtain consent from the other parties to the contracts for the assignment or transfer of the contract.

Documents recording the transfer of contracts can be executed outside Australia. The parties can agree to execute counterparts, and should clearly specify in the contract that this is permitted.

c) Specification of Contracts. The contracts being transferred may be generally described such as "all contracts entered into by [Party X] relating to the [Business]" (as long as the business is clearly identifiable and/or defined) or they may be identified by reference to certain categories or location, but in each case the contracts to be transferred must be clearly described to allow them to be objectively identified.

There is no requirement for the parties to list the contracts being transferred in separate schedules. In practice, parties will usually agree a schedule listing the material contracts to be transferred with specific details such as date of the contract, title of the contract, and parties to the contract.

2. Administrative, Corporate and Other Approvals

Generally, the transfer of contracts does not require any special governmental or administrative approvals. The transfer of contracts relating to certain industries may require government or industry authority approval, such as a contract for the transfer of an interest in a licensed (and non exempt) electricity generator.

The constitution or articles of association of the seller and purchaser will usually set out the corporate actions required of the seller or purchaser for the proposed transaction.

Approval from counter parties and other third parties may be required if it is so stated in the contracts to be transferred. If the other parties refuse to grant approval, there may be an argument that the other parties to the contract cannot unreasonably withhold their consent or approval. If the approvals or consent from the other parties are not given, the transfer of the contracts may be invalid.

3. Automatic Transfer of Contracts (Other than Lease and Employment Agreements)

Some examples of contracts which may be automatically transferred to the purchaser in the event of an asset deal are hire purchase agreements and some asset related insurance contracts, but this will depend on their terms on a case by case basis.

4. Filing Requirements

Generally, the transfer of contracts does not require special filings with public authorities or registrations.

5. Treatment of Existing Contractual Claims and Obligations

If the counter party consented to the transfer of the contract, then any unperformed obligations or unfulfilled liabilities under the contracts will automatically transfer to the purchaser upon transfer of the contracts.

If the seller has previously disclosed to the purchaser the extent of the unperformed obligations or liabilities under these contracts, the parties may agree to adjust the purchase price to take them into consideration. Alternatively, it is also usual for the purchaser to require some form of indemnity from the seller in relation to unperformed obligations in the asset transfer agreement.

6. Warranty Claims Resulting from Events prior to Transfer

Since the transfer of contracts also involves the transfer of claims and obligations relating to the contracts, the purchaser upon assuming the obligations of the seller under the contracts will also become liable for warranty claims resulting from events prior to the transfer of the assets being affected. The purchaser can seek to protect its interest by specifically contracting out of that liability (such as entering onto a deed of novation with the counter parties clarifying the same) or by including indemnity provisions in the asset transfer agreement.

E. IP Rights

1. Characteristics of Intellectual Property Rights (e. g., Trademarks, Patents, Utility Models, Domain Names) ("*IP Rights*") as to:

a) **Language of Documentation.** The sale documents regarding the transfer of IP Rights may be drafted in any language. English is the usual language, but it is not mandatory. An English translation should be prepared so that the transfer of any registered IP Rights can be recorded on the relevant Register. The transfer documentation must be lodged with the relevant office within IP Australia for the transfer to be recorded.

The documents can be executed in two languages, preferably with a nominated language prevailing in case of any inconsistency.

b) **Form of Documentation.** Documents recording the transfer of tangible assets can be executed outside Australia. The parties can agree to execute counterparts, and should clearly specify in the contract that this is permitted.

c) **Specification of IP Rights.** The intellectual property rights being transferred may be generally described such as "all intellectual property rights relating to the [Business]" (as long as the business is clearly identifiable and/or defined), but the intellectual property rights to be transferred must be clearly described to allow them to be objectively identified. Typically, a definition of what constitutes intellectual property rights will be included.

There is no requirement for the parties to list the intellectual property rights being transferred in separate schedules. However, in practice, parties will usually identify each registerable intellectual property right with relevant registration numbers to allow ease of recordal of the transfer of ownership. Without each registrable IP Right specified, the document will not be able to be relied upon to have the transfer recorded on the relevant Register.

2. Administrative, Corporate and Other Approvals

Transfer of intellectual property normally does not require any special governmental or administrative approvals.

The constitution or articles of association of the seller and purchaser will usually set out the corporate actions required of the seller or purchaser for the proposed transaction.

Whether approval of a security holder is required will depend on the terms of the agreement creating the encumbrance. If under the terms of the agreement the seller must obtain prior approval of the security holder before being able to deal with the assets, then such consent should be obtained. If the security interest is recorded on the Register for the relevant IP Right, the relevant office at IP Australia will notify the security holder before taking any action in relation to the IP Right.

3. Filing Requirements

When registerable IP Rights are transferred, the transfer of those rights should be notified to the relevant office of IP Australia so that the transfer is recorded on the relevant Register (for example, the transfer of a patent must be notified to the Patents Office so that the transfer can be recorded on the Patents Register). This requires lodgment of the relevant transfer documents. The recordal of the transfer is declaratory only, and it is not necessary to effect the transfer of the relevant IP Right.

4. Applicable International (Multilateral) Agreements or Treaties

Australia is a party to, and has ratified, the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property.

Australia is a party to, and has ratified, the Madrid Agreement and the Madrid Protocol regarding Trade Marks.

F. Receivables

1. Characteristics as to:

a) Language of Documentation. The sale documents regarding the transfer of receivables may be drafted in any language. English is the usual language, but it is not mandatory.

The documents can be executed in two languages, preferably with a nominated language prevailing in case of any inconsistency.

b) Form of Documentation. The transfer of receivables does not require any special form of documentation. It is usually provided for in the asset sale or transfer agreement.

Documents recording the transfer of receivables can be executed outside Australia. The parties can agree to execute counterparts, and should clearly specify in the contract that this is permitted.

c) **Specification of Receivables.** The receivables being transferred may be generally described such as "all accounts receivable relating to the [Business]" (as long as the business is clearly identifiable and/or defined) or they may be identified by reference to certain categories, but in each case the receivables to be transferred must be clearly described to allow them to be objectively identified.

There is no requirement for the parties to list the receivables being transferred in separate schedules.

2. Administrative, Corporate and Other Approvals

The transfer of receivables does not require special governmental or administrative approvals.

Whether or not corporate approvals are required depends on the constitutional documents of the seller and purchaser.

Notification of the transfer to the debtors is generally not required unless the underlying debt agreements provide otherwise. However, for practical reasons, the purchaser should inform the debtor of the transfer. If the debtor is not notified then they may continue to make payments to the seller on the receivables transferred.

3. Filing Requirements

The transfer of receivables does not require special filing with any public authorities or registration with registers or (online) databases.

G. Liabilities

1. Characteristics as to:

a) **Language of Documentation.** The sale documents regarding the transfer of contracts may be drafted in any language. English is the usual language, but it is not mandatory.

The documents can be executed in two languages, preferably with a nominated language prevailing in case of any inconsistency.

b) **Form of Documentation.** The transfer of liabilities does not require special form of documentation. It is usually included in the asset sale or transfer agreements.

Documents recording the transfer of liabilities can be executed outside Australia. The parties can agree to execute counterparts, and should clearly specify in the contract that this is permitted.

c) Specification of Liabilities. The liabilities being transferred may be generally described such as "all liabilities relating to the [Business]" (as long as the business is clearly identifiable and/or defined) or they may be identified by reference to certain categories, but in each case the liabilities to be transferred must be clearly described to allow them to be objectively identified.

There is no requirement for the parties to list the liabilities being transferred in separate schedules. Typically the parties will define the parameters of the nature of the liabilities being transferred.

2. Administrative, Corporate and Other Approvals

The transfer of liabilities does not require special governmental or administrative approvals.

Whether corporate approvals are required, and at what level, depends on the constitutional documents of the seller and purchaser.

Generally at law, a liability cannot be transferred without the consent of the creditor. Typically, the provisions of the underlying agreement will stipulate that the creditor's consent is required.

3. Filing Requirements

The transfer of liabilities does not require any special filings with public authorities or registration with registers or (online) databases.

4. Purchaser's Liability for:

a) Tax Obligations. A wide range of different income tax rules may apply (depending on the nature of the asset involved) to impose income tax on a seller disposing of assets. In broad terms these rules will impose liability for and responsibility for any tax obligations up to the date of disposal on the seller. While the seller will usually be liable for unpaid taxes, to the extent that a purchaser may be impacted by historical tax obligations relating to assets acquired as part of a business acquisition, a purchaser will usually seek to factor such obligations into the purchase price, and seek to accompany the acquisition with appropriate tax warranties and indemnities.

b) Environmental Contamination. In Australia contaminated land laws are on a state-by-state basis, and range between a strict "polluter pays" policy and the "leave it to the occupier" approach. National policies favor the polluter pays principle if the polluter is solvent and identifiable. Liability otherwise extends to the person in control of the site, irrespective of whether the person is the owner or the current occupier. In some instances an occupier is deemed to have caused pollution on commercial or industrial premises. The legislative regimes in most states established a hierarchy of clean-up liability.

State environmental regulators have the ability to serve a clean up order on the occupiers of premises or the person who caused or permitted the pollution to occur. The hierarchy of assigning responsibility for the clean up varies from state to state. Generally, the occupier has a statutory right to recover reasonable costs from the polluter, but where the polluter is no longer solvent the costs may be borne by the occupier.

In both asset transfers and share transfer transactions it may be appropriate to obtain environmental indemnities for environmental contamination occurring prior to the date of sale. If there is significant contamination which is likely to continue, it is usual practice to obtain an environmental consultant's assessment of the pollution at the date of sale. The consultant's report will then set a baseline from which calculations regarding liability may be made. The agreement can then be amended or a price reduction sought to reflect clean up costs or other liabilities.

c) Products Sold or Services Rendered by the Seller to Third Parties. This depends on if the liabilities for these products sold or services rendered were included as the list of liabilities to be assumed by the purchaser. If the past products are sold or services rendered by the seller as a company (without connection to any assets), then on an asset sale, the purchaser should not be responsible for any liabilities arising from the products sold or services rendered by the seller to third parties for the period prior to the acquisition. The consumer of the products or services should only have a cause of action against the seller. Typically a purchaser would seek indemnification or warranty protection against any potential product recall or liability.

5. Automatic Transfer of Other Liabilities

Unless required by law, a purchaser will generally only assume those liabilities of a business that it agrees to accept, however, certain liabilities attaching to the assets may automatically transfer to the purchaser on an asset sale such as any outstanding payments for insurance premiums and liabilities under hire and purchase agreements.

From an income tax perspective, other liabilities (such as provisions for employee entitlements and provisions for bad or doubtful debts) may also be transferred to a purchaser depending on the nature of the assets (or business) acquired. Specific income tax rules will apply to determine the treatment of such items.

For example, in broad terms, a purchaser will not be able to claim a deduction for income tax purposes in respect of debts purchased from a seller that are subsequently written off as "bad". In these circumstances, again to the extent that a purchaser may be impacted by such items, a purchaser will usually seek to factor these into the purchase price in an endeavor to make the acquisition as "tax-neutral" as possible.

From a GST perspective, the view taken by the Australian Taxation Office is that there are no additional GST consequences arising if the purchaser assumes any liabilities attaching to the assets that automatically transfer to the purchaser by virtue of statue. However, if the liabilities do not transfer by virtue of statute, but are transferred under an agreement between the purchaser and the seller, the amount of the assumed liabilities is viewed as being part of the consideration paid for the supply.

6. Contractual Protection as to 4 and 5 above

It is usual for the purchaser to protect itself by obtaining a broad range of representations and warranties from the seller relating to the business.

Indemnity provisions for tax and environmental concerns are more common in share transfer agreements, but may be negotiated in asset transfer agreements depending on the nature of the business being sold.

H. Employees

1. Transfer of Employees

Under an asset sale, the employees of the seller do not automatically transfer to the purchaser.

Typically, at completion of the acquisition the current employment contracts will be brought to an end and the employees would simultaneously be re-employed by the purchaser, on substantially identical terms. This requires offers of employment to be made and individually accepted.

The purchaser usually recognizes prior service and accrued service based entitlements, such as annual leave, for transferring employees. Superannuation (pension) entitlements typically continue with the purchaser taking responsibility for future contributions. It is sometimes the case that employees will no longer be eligible for membership of the fund sponsored by the seller. In that situation, either employees are invited to transfer to a new fund into which contributions can be made, or arrangements are made for a compulsory transfer to a successor fund.

Redundancy entitlements are capable of being triggered because the employment will terminate for the reason that the seller no longer requires the job the employee has been doing to be done by anyone. Whether or not an employee has severance pay entitlements upon redundancy will depend on the terms of the employee's employment. It is usual for a seller to avoid severance pay liability arising by requiring that the purchaser make offers of acceptable alternative employment which reflect the current employment terms and recognize prior service and accrued leave entitlements. This needs attention and planning in each case.

There are limited statutory transfer of business undertaking provisions which make some industrial instruments and employment entitlements binding upon the transmitee of a business.

2. Approval of Works Council, Trade Union or Other Institutions

No approvals, as such, are required from any works council, labor agency, trade union or other institution.

There are specific notification requirements under the Workplace Relations Act 1996 (Cth) where a business has been transmitted and an employee of the transmittor becomes an employee of the transmitee.

It is common for collective agreements and other industrial instruments to contain requirements to notify and consult relevant trade unions where a decision is made about changes to a business (such as the sale of the business) and which will result in terminations of employment. There are similar requirements under the Workplace Relations Act 1996 in the case of an anticipated termination of 15 or more employees.

A failure to comply with these requirements would not invalidate the asset transfer but could attract penalties and other adverse practical consequences.

3. Contractual Protection as to Labor Issues

Depending on the number of employees being transferred and the complexity of the employment arrangements in relation to them, it is customary to provide (a) indemnities from the purchaser to the seller against claims from transferring employees relating to the period of employment following completion and (b) indemnities from the seller to the purchaser against claims from non-transferring employees and for the period of employment prior to completion.

I. Tax Implications

1. Value Added Tax

The relevant tax that is equivalent to the VAT in Australia is the Goods and Services Tax or the GST. The GST Law is provided for under the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Typically, a supply of assets is treated as a taxable supply. The GST amount payable on a taxable supply is 10% of the value of the taxable supply.

However, if the assets are being transferred as part of a going concern which meets the requirements of a GST-free supply of a going concern, there may not be any GST payable on the supply. Please refer to Section A, 1 above for further information in this regard.

2. Real Property Transfer Tax

Different States and Territories in Australia apply different rates of stamp duty to the transfer of dutiable property, including land. Duty rates for the transfer of an interest in land apply on a rising scale. The table below outlines which property is dutiable on their transfer in each State and Territory and the highest rate of duty.

State/Territory	Dutiable Property	Highest Rate of Duty
New South Wales	Includes land and an option to purchase land. Transfer of a lease for a premium also dutiable.	AUS 40,490, plus 5.5% over AUD 1,000,000
South Australia	Includes conveyance of any real or personal property.	AUD 21,330, plus 5.5% over AUD 500,000
Queensland	Includes land or an option to purchase dutiable property.	AUD 23,975, plus 4.5% over AUD 700,000
Western Australia	Includes land and leases.	AUD 20,700, plus 5.4% over AUD 500,000
Northern Territory	Includes land or an option to purchase dutiable property.	5.4% over AUD 500,000
Tasmania	Includes land, a mineral tenement or fixtures thereon, or an option to purchase dutiable property.	AUD 6,550, plus 4.0% over AUD 225,000
Victoria	Includes interests in land (an estate in fee simple, a life estate/estate in remainder, Crown lease, granting of a lease for a premium with a covenant for future transfer of fee simple).	5.5% over AUD 870,000
Australian Capital Territory	Includes land, Crown lease, long term lease, or an option to purchase land or a Crown lease.	AUD 49,250, plus 6.75% over AUD 1,000,000

3. Other Tax Issues

A wide range of different income tax rules will apply to the disposal of an asset, depending on the nature of the asset involved. For example, sellers should be aware that a disposal of trading stock will ordinarily be deemed to take place at market value for income tax purposes.

Purchasers should also be aware that the ability to claim depreciation deductions in respect of certain types of assets (such as eligible construction expenditure incurred in connection with buildings) may be restricted to the quantum of any undeducted/undepreciated amount of the seller, irrespective of the purchase price allocated to such assets. Again in these circumstances, the purchaser will usually seek to adjust the purchase price to reflect the tax status of the particular assets after acquisition.

While not usually as "onerous" in terms of obligations when compared to share sales, asset disposals nevertheless still require appropriate and due attention to relevant issues required to be considered, including income tax, GST and stamp duty implications.

J. Bankruptcy Law

1. Challenge of Asset Transfer in Case of Insolvency

A transaction which is an uncommercial transaction may be set aside by a court in Australia under the Corporations Act 2001 (Cth). A transaction will be an uncommercial transaction if:

(i) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction having regard to the benefits (if any) and detriment accruing to the company, and the benefits accruing to other parties, as a result of the transaction (Section 588FB of the Act);

(ii) the company was insolvent at the time the transaction was entered into or became insolvent as a result of the transaction (Section 588FC); and

(iii) the transaction was entered into during the two years ending on the date the company entered liquidation (or in the case of a transaction with a "related entity party", four years) (Section 588FE).

In addition, a transfer may be deemed an unfair preference for the purposes of Section 588FA of the Corporations Act 2001 (Cth) if it constitutes the repayment of an unsecured debt, ahead of other creditors.

2. Acquisition of Assets that are Subject to Insolvency Proceedings

An officially appointed liquidator is an officer of the court and has the power to sell the business (including individual assets) of the company in liquidation. If the seller is in liquidation, it is the liquidator, and not the board of directors of the company, which has the power to sell the business. Certain obligations are imposed on the liquidator in relation to its conduct in obtaining the best price possible.

K. Timing and Costs

1. Timeframe of Asset Transfer

If the transaction requires approval from FIRB, according to the FATA the Treasurer must make a decision within 30 days of the date of receipt of the application. The Treasurer may ask for an extension/further information extending such 30 day period by a further period of time.

If the transfer is referred to the ACCC, the ACCC must decide on such applications within 40 business days (which may be extended in certain circumstances, for example