Guatemala

Negotiated M&A Guide

Corporate and M&A Law Committee

Contact

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INTRODUCTION

Mergers and acquisitions of privately held companies in Guatemala are ruled by the Code of Commerce.

If the acquisition involves a listed or public company, such transaction is also ruled by the Securities and Commodities Market Law -SML- ("*Ley del Mercado de Valores y Mercancías*"), although in practice there are no listed companies in Guatemala. The Securities Exchange deals principally with debt instruments.

There is no competition or anti-trust law in Guatemala, although some projects have been discussed by Congress and we expect a law to be enacted in the next few years. In accordance with the Free Association Agreement with the European Union, Guatemala had agreed to enact a competition law by the end of November of 2016, but Congress has not enacted such law, and we have no information when Congress will do so.

With very few exceptions, there is no need to obtain any type of authorization from any governmental agency in order to acquire the assets of a company or shares of privately held Guatemalan companies, notwithstanding that the purchaser is foreigner and even if a controlling interest is obtained. Companies in Guatemala must be owned by at least two partners/shareholders (they may not be wholly owned) and all partners/shareholders may be foreigners.

In relation to listed or public companies, article 39 of the Securities and Commodities Market Law -SML- ("*Ley del Mercado de Valores y Mercancías*") establishes that any person or persons who have an intention to acquire shares (or an option to acquire the same), with the purpose of acquiring partial or total control of the company, shall notify their intention to the issuing company, the Registry of Securities and the Stock Exchange in which such shares are negotiated.

STRUCTURE OF THE TRANSACTION

(a) Introduction:

Acquisitions in Guatemala are normally done either through a share purchase or an asset purchase. Joint Venture Agreements are also used, but they normally involve a share purchase agreement, or the formation of a new company to which the operation of the local company is transferred and in which both parties are shareholders.

In either type of structure, due diligence is normally done.

Although in principle it seems that seller will prefer a share purchase and buyer will prefer an asset purchase, there are many factors that may influence such decision.

(b) Share purchase:

One significant right of partners in commercial companies whose capital is not divided in shares (general partnership –"*sociedad colectiva*"-; simple special partnership –"*sociedad en comandita simple*"-; and limited liability partnership –"*sociedad de responsabilidad limitada*") is the statutory right of first refusal to acquire the interest of a selling partner. In these companies, partners can only transfer, or sell their interest, if unanimously authorized by all partners.

According to the Code of Commerce, in the case of commercial companies whose capital is divided in shares (corporation/LLC –"*sociedad anónima*"-; and special partnership with shares –"sociedad en comandita por acciones"-), shareholders only have a right of first refusal to acquire newly issued shares.

However, it is possible to establish in the corporate charter a shareholder right of first refusal with respect to the sale of shares by a shareholder. It is also possible, although not common, to establish in the corporate charter the right to force a minority shareholder to transfer its shares.

In addition, if agreed in the articles of incorporation (although not mandatory under the Code of Commerce), the transfer of shares can be subject to prior approval by the board of directors.

In general, shares are transferred by a two-step-process: (i) endorsing the corresponding share certificates, and (ii) registering the transfer in the shareholders registry book of the company.[1]

The principal minority shareholders' rights established in our law are:

- Judicial summons of a shareholders meeting. Any shareholder has the right to appear before a Judge and request the summons of a shareholders meeting if:
    - The general ordinary annual shareholders meeting did not take place on the date stipulated in the corporate charter;
    - Notwithstanding that such shareholders meeting took place, one of the matters that should have been treated, was not included; or
    - More than one year has gone by since the last ordinary meeting.
- Extra-judicial summons of a shareholders meeting. Shareholders who hold at least 25% of the voting shares have the right to request to the administrators (board of directors or sole administrator) in writing, at any time, the summons of a general shareholders meeting in order to decide the matters established in their petition. If the administrators do not proceed accordingly, they can request such summons before a Judge.
- Right to challenge the decisions adopted by the shareholders meetings. Any shareholder has the right to challenge, before a judge in an ordinary proceeding (unless arbitration is agreed in the corporate charter as the means to resolve all differences between shareholders and shareholders and the company), the decisions adopted by a shareholders meeting that either contravene the law or the corporate charter. Such action has to be started within six months of the meeting and the judge can order the suspension of the execution of the decision, provided the shareholder pays a bond in order to cover the damages and losses that can be caused by such suspension. The problem with the ordinary proceeding is that it usually takes not less than two years, and in the meantime the company cannot adopt the suspended decision.
- Right to request the suspension of the execution of the challenged decisions taken by the shareholders meeting. It has already been explained above.
- Right to oppose to the company waiving its right to deduct responsibility against an administrator (director). If the shareholders meeting, with a vote of 75% of the voting shares, decides to waive its right to deduct responsibility against an administrator (director), the shareholders representing 10% of the subscribed capital (and who did vote against such decision) have the right to act against such administrator (director).
- Right to deduct responsibility against an administrator (Director). If the person appointed by the company to deduct responsibility against the administrator (director), does not start the corresponding action within two months of the decision to do so, any shareholder has the right to start such action himself.
- Right to appoint an External Auditor. If the general ordinary annual shareholders meeting does not appoint the external auditor, any number of shareholders, notwithstanding that they represent

[1] Due to the enactment of the Domain Extinction Law ("Ley de Extinción de Dominio") (Decree of Congress number 55-2010), bearer share certificates were suppresed in Guatemala.

minority, have the right to appoint, on behalf of the company, such external auditor (until the shareholders meeting appoints one).

- Right to summon a General Shareholders Meeting in order to appoint an External Auditor. If for any cause the company does not have an external auditor, the board of directors has to summon, within the following three days, a general shareholders meeting in order to appoint one. If the board of directors does not do so within the established time, any shareholder has the right to request a Judge to make such summons.

- Cumulative voting in the election of members of the Board of Directors. In the election of members of the board of directors, shareholders with voting rights have as many votes as the number of their shares multiplied by the number of administrators (directors) being appointed. Shareholders have the right to give all their votes to one candidate or to distribute them among two or more candidates.

According to our law, there is no need to grant any type of agreement in order to document the transfer of shares of a Guatemalan company, the endorsement of the shares is sufficient. However, buyer normally requires an agreement in order to limit his responsibility with respect to the company, as of the acquisition date. The agreement may be documented either in a public deed (authorized by a notary public) or in a private document (as opposed to a public deed), and may be subject to foreign law and foreign jurisdiction.

One significant advantage of structuring the transaction as a share purchase is that the transfer of shares is specifically exempt of Value Added Tax.

(c) Asset purchase:

Although the transfer of assets may seem to be the preferred option for buyer in order to limit his liability, one important disadvantage is that, in accordance with our Code of Commerce, if the majority of assets which form a commercial establishment[2] are sold, such sale shall be deemed to be sale of the commercial establishment subject to the same proceedings as apply to a merger of companies, in order to protect the company's creditors. Obviously, this is a more lengthy and formal proceeding than transferring the shares.

The transfer of assets is subject to Value Added Tax and the acquirer of the assets is jointly and severally responsible with seller for the compliance of the tax obligations derived from the ownership and transfer of such assets. Such liability may be limited by buyer to a term of one year by giving notice of the acquisition to the tax authorities.

Unless otherwise agreed, the acquirer of a commercial establishment is responsible for the agreements executed for the operation of the activities of the commercial establishment. In addition, the transfer of assets, if deemed to be the sale of a commercial establishment, also includes the transfer of the debts incurred by the previous owner (and anything agreed to the contrary shall be null and void).

The Code of Commerce establishes that an acquisition agreement of a commercial establishment that does not detail which elements are transferred shall include:

- The locale
- The clientele and the goodwill
- The commercial name and other distinctive signs of the establishment

[2] "Empresa mercantil" which is the union of work, material elements and incorporated assets, coordinated in order to systematically sell goods or render services to the public, in order to obtain a profit. All commercial companies have to operate through commercial establishments and a company may own one or more establishments.

- The lease agreements
- The equipment and machinery
- The employment agreements
- The merchandise, the loans and other goods and similar assets

PRE-AGREEMENT

(a) Letter of Intent:

A letter of Intent (LOI) or Memorandum of Understanding (MOU) is common in Guatemala. The parties usually execute it as a non-binding document in which they define their intention to start negotiations and due diligence towards an acquisition of a company.

However, there are some clauses that the parties normally agree to be binding. The most common binding clauses in LOI's are: confidentiality and dispute resolution.

(b) Voting agreements with major shareholders:

Our law allows agreements among shareholders with respect to voting in a certain manner, which may not have a term longer than ten years. These agreements must be documented in a public deed before a notary public who will send notice of its existence to the Commercial Registry and annotate the share certificates of its existence. The existence of such voting agreements does not limit the transfer of the shares.

(c) Due diligence:

Due diligence is normally conducted prior to acquiring a local company. The most relevant matters that are reviewed in a normal due diligence process of a local company are:

- The due registration of the company and of its representatives and the validity of all necessary authorizations and permits (including environmental permits) for the company to engage in the business it conducts;
- The necessary authorizations for the proposed transactions;
- The validity and registration of the share certificates;
- That no resolution has been adopted in order to dissolve and liquidate the company;
- The financial statements of the company;
- The tax filings of the company within the term of the statute of limitations, as well as any tax adjustments made to the company;
- The properties of the company and all material contracts executed by the company;
- All litigation matters; and
- All relevant employment matters.

Some of the information provided by seller can be reviewed in the public registries (the registration of the company and of its representatives, some litigation), but normally buyer has to rely on the good faith of seller with respect to the information provided.

ACQUISITION AGREEMENT

(a) Acquisitions by foreign buyers (subject to foreign law):

Lately, a high percentage of acquisitions of local companies have been made by foreign buyers. In these acquisitions, the acquisition agreement is subject to foreign law and foreign jurisdiction, with all the common representations and warranties, covenants, conditions of closing, indemnification provisions and dispute resolution rules of such agreements. The majority of such acquisitions were made by U.S. companies, subject to U.S. law and U.S. jurisdiction, but lately there have also been acquisitions by European companies and South American companies.

(b) Acquisitions by local buyers (or subject to local law):

In case of acquisitions made by local buyers (or subject to local law), similar to acquisitions subject to foreign law, the main concern of the parties is to limit their liability. Seller normally tries to accept as little responsibility as possible and buyer normally tries to make seller responsible for any contingencies up to the moment of sale.

(c) Payment and escrows:

Another concern of the parties is the payment of the purchase price. In order to ensure that seller can respond in the event of a breach of a representation and warranty, it is not unusual to have payment made over time. In such cases an escrow agreement is very useful.

(d) Representations and warranties:

The usual representations and warranties of the seller in an acquisition agreement, subject to local law, are:

- Corporate situation of the company;
- Corporate authorizations;
- Integration of the capital and shares;
- Assets included;
- Accounts payable;
- Intellectual property;
- Clients;
- Judicial and administrative proceedings;
- Taxes;
- Agreements;
- Distribution and representation agreements;
- Employment matters;
- Financial statements;
- Compliance of laws;
- Insurance;
- Information provided;
- Software licenses;

The usual representations and warranties of buyer are:

- Legal existence;
- Authorizations for the acquisition;
- Conflict with other agreements;
- Acceptance of guarantees;

(e) Covenants:

One typical covenant of seller is non-competition for a specified period of time. Both parties also normally commit to maintain confidentiality with respect to certain terms of the transaction.

(f) Indemnification provisions:

Indemnification provisions are also an important matter in the acquisition agreement and normally buyer will obtain a commitment from seller that: (i) he shall respond for all past contingencies up to the moment of sale, and (ii) he shall appear and defend any lawsuits, administrative proceedings and tax adjustments; and (iii) if buyer is obliged to pay any amount, seller shall indemnify him.

(g) Dispute resolution:

The most common form of dispute resolution is arbitration. The Guatemalan arbitration law is based on the United Nations Commission on International Trade Law model law of international commercial arbitration.

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