Spain

Negotiated M&A Guide

Corporate and M&A Law Committee

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1. INTRODUCTION

Company acquisition agreements are not defined in the law (in Spanish called “atypical agreements”, *contratos atípicos)*. Their clauses are not legally regulated and their content will depend on each specific case. In Spanish legal practice, however, acquisition agreements have their own typical terms which hail from the Anglo Saxon legal culture.

Despite the fact that company purchase agreements are, therefore, not defined, the general provisions of Spanish civil and commercial law will have an impact on their wording, basically: (i) the Civil Code; (ii) the Commercial Code; (iii) the Capital Companies Law; and (v) the Commercial Registry Regulations.

2. STRUCTURE OF THE TRANSACTION

The two broad classes of company acquisitions existing in Spanish practice are share acquisitions and asset and liability acquisitions.

It may be said that a share purchase is more straightforward than an asset and liability purchase as the only asset acquired are the shares in the target company. In an asset and liability purchase, however, the purchaser might seek to purchase all or some of the assets and, in this case, the transfer rules for each of the asset and liability items to be transferred will come into play.

It is hard to say which of these two types of acquisition is preferred by each party (purchaser and vendor), as it will depend on the specific circumstances of each case. As a general rule, however, it may be said that vendors will prefer a share purchase and purchasers will usually prefer an asset purchase. The main support for this view is that with a share purchase the vendor severs its ties completely with the transferred company (with the purchase of assets and liabilities the vendor will continue to be a shareholder) and in an asset and liability purchase the purchaser is able to choose which items it wants and which it does not.

3. PRELIMINARY CONSIDERATIONS

The following paragraphs describe various issues envisaged in the Spanish Capital Companies Law to be taken into account in the event of a company acquisition:

- The two broad types of corporate enterprises are: the Spanish corporation (*sociedad anónima* or *SA*) and the Spanish limited liability company (*sociedad de responsabilidad limitada* or *SL*). The capital stock of a Spanish corporation is divided into shares (*acciones*) that can be represented by (registered or bearer) certificates or by book entries. The capital of a Spanish limited liability company is divided into participations (*participaciones sociales*) that are not securities in character, cannot be represented by certificates or book entries, or called tradeable shares of stock. For the purposes of this document, both shares and participations, will be referred to as shares.

- Article 106 of the Spanish Capital Companies Law requires share transfers to be recorded in a public document. Despite the fact that Spanish law only requires the intervention by a public authenticating official where shares are represented by bearer certificates and the transfer is not performed with the participation or mediation of a broker-dealer, or of a credit institution, it is usual practice for share transfers to be documented also in a public deed executed before a notary.

- The bylaws of Spanish corporations and limited liability companies usually contain restrictions on the transfer of shares, which must be taken into account and considered for the purposes of a share transfer.

- Article 143 and 150 of the Spanish Capital Companies Law do not allow financial assistance to be provided for the purchase of the corporation’s own shares or the shares of its controlling company, by a third party in the case of a Spanish corporation, and for the purchase of its own shares or those issued by a company in the group to which it belongs, in the case of a Spanish limited liability company.

4. PRE-AGREEMENT

In Spanish legal practice the acquisition process usually begins with the negotiation and signing of a letter of intent. The Spanish term "*carta de intenciones*" arose from the introduction to the Spanish legal system of a foreign legal concept and is a translation of the expression "***Letter of Intent***", also known as "***Memorandum of Understanding***", "***Agreement in Principle***" or "***Heads of Agreement***". There are no provisions on this concept in either the Spanish Civil Code or in the Spanish Commercial Code.

The aim of these documents is both to: (i) define and set out for evidence purposes the parties' steps and their sought intention regarding the potential conclusion of a legal transaction, and (ii) define the transactional intent, which is neither contractual nor binding for the parties with respect to a future agreement.

This document does not bring any real value to the negotiation; it has more of a practical value for evidence purposes. Even if there is no letter of intent, the parties have the obligation to negotiate in conformity with fair and honest conduct, and to act with loyalty, or in other words under the principle of good faith that prevails in Spanish law. Despite this duty, in complex transactions involving economic expenses and the disclosure of confidential information, it is sometimes hard to know what the other party is seeking, and therefore without a given amount of certainty the parties will not embark on these projects. The letter of intent attempts to provide that certainty by having the parties state the transaction they seek to make and the terms and conditions for that transaction.

Paradoxically, although the letter of intent seeks to give certainty to the negotiation, a badly-worded letter of intent can create the opposite legal effect to that intended. If the parties provide too much detail of their steps or if they fail to make it clear that their intention is to ascertain, study and negotiate, without seeking to bind themselves to the intended transaction, they run the risk that the letter of intent will be binding. The Spanish Civil Code provides that if the terms of the agreement are clear and leave no doubt as to the intention of the contracting parties, the manner in which the transaction is characterized will not matter. If it contains fully determined elements and the negotiations are at a very advanced stage, it could be construed that the parties' intention was to draw up a binding agreement even though it was given another name. In that case the parties will be obligated and, instead of a declaratory document, we will have a binding document.

On a practical note, these documents should contain the identification particulars of the parties, a statement of the intention to negotiate, a summary of the steps carried out to date, their positioning, an explanation of the project or transaction that they intend to carry out in the future, the terms and conditions to be met or steps to be taken to achieve an understanding, the objectives sought, and/or the time in which they must be achieved. It is recommended to include a "non-binding" clause, meaning a clause stating that the document is not legally binding to prevent the declaratory document of intent having any obligatory force between the signing parties. In addition, some binding clauses between the parties are often included to give certainty to the negotiations, such as confidentiality or exclusivity clauses or clauses restricting parallel negotiations, among others. Since, even though the document is declaratory, and this is stated, there is nothing to prevent the parties agreeing to make certain clauses binding.

To avoid the risk of acquiring an obligation by signing that declaratory document, a series of strategies may be recommended to clarify the parties' intended absence of commitment. Thus, expressions denoting wishes or options should be used, the document should be deliberately indeterminate as to what the future commitment would be, so that any attempt to secure contractual performance will fail. The parties should try to make the subject-matter of the commitment highly indeterminate, conditions precedent should be left for the agreement or for the commitment. It is also advisable to sign a binding clause stating the intention of the signing parties to give the other statements a nonbinding character, and lastly it would be recommended to draw up short documents so that the elements are not too well-defined, and for them to be clear as to the parties intentions.

Although the concept of a letter of intent seems clear, there is often confusion between the concept of a letter of intent and the concept of pre-agreement and agreement. The difference with respect to the legal concept of a pre-agreement is that a pre-agreement is a genuine agreement, and there is contractual intent. In a pre-agreement, the parties agree to sign a definitive agreement, at a later date, and therefore acquire the obligation to become bound. The essential elements of the agreement are predefined in the pre-agreement. The importance of this distinction is that the effects of the letter of intent and the type of civil liability that the parties could incur if they breach its terms will depend on the legal character given to the letter of intent (whether it is a preliminary understanding, pre-agreement or agreement). The signature, acceptance and subsequent breach of a letter of intent can give rise to: civil liability for rupturing preliminary understandings, pre-contractual liability and/or contractual liability.

5. DUE DILIGENCE PROCESS

It is very common practice for the parties to agree to carry out, before perfecting the purchase transaction, through the purchaser's advisors and at the purchaser's expense, a due diligence process. This will enable the purchaser, among other things: (i) to identify the risks and contingencies associated with the target company (or its assets); (ii) to obtain elements to determine the value of the target to be acquired; (iii) to obtain valuable information for the negotiation; (iv) to identify potential synergies; (v) to determine the structure of the transaction; (vi) to determine the solidity of the proposed investment; and (vii) to determine the level of security that will need to be requested from the vendors in the purchase agreement.

The main areas or matters reviewed in a due diligence process include commercial, real estate, administrative or public law and compliance, information technology, employment and social security and tax, although the purchaser might leave out any of these areas that do not cause it too much concern.

The letter of intent usually states the length of time the purchaser has to perform the due diligence process and the vendor's obligation to give the purchaser and its advisors access to its facilities, documents and information as necessary to carry it out.

The procedures used to supply information are the check list and the data room. In the first procedure the purchaser requests certain information in a check list delivered to the vendor, which is usually a long list of all of the information that the purchaser wishes to analyze. In the second procedure the vendor gathers together all of the information it intends to provide to the purchaser and allows the purchaser to review the documents it considers appropriate in a physical room or virtual data room. The procedure for supplying information through a check list is more beneficial to the purchaser whereas the data room is better for the vendor.

Very often, certain information provided by the vendor will be checked against public information obtainable from public Spanish agencies such as the Commercial Registry, the Property Registry, the Spanish Patents and Trademarks Office, the Social Security General Treasury or the Local Councils (to obtain zoning information, basically), among others.

The due diligence process is usually not the same for a share purchase as for an asset and liability purchase. Generally speaking, a due diligence process for a share purchase is usually more dense and involves a greater amount of research than for an asset purchase. In asset transfers it is common practice in Spain to study how the ownership of the various assets can or must be transferred. Whereas for some assets (machinery, for example) a simple private agreement will be sufficient, for the transfer of real estate, intellectual property or administrative concessions it will be necessary or recommendable to obtain a public document of transfer. In this case, the purchaser will also have to analyze whether the agreements and the obligations and rights under those agreements can be assigned with or without the consent of the other party.

In the case of a transfer of shares, it is important for the review of agreements to include an examination of change of control clauses. These clauses usually allow the other party to terminate the agreement or amend its terms and conditions if, for example, the shareholder or shareholders holding the majority of the shares in a company cease to hold them. If such a clause exists, the purchaser will have to consider whether to obtain the prior acceptance of the other party or to include the third-party consent in the purchase agreement as a condition precedent to the transaction.

The results of the due diligence will have an impact on the representations and warranties that the purchaser requests from the vendor which are analyzed below (see section 7 (vi)).

6. CONCENTRATION CONTROL ISSUES TO BE TAKEN INTO ACCOUNT IN AN ACQUISITION TRANSACTION

Concentration control legislation must be taken into account when carrying out an acquisition. There are two sources for concentration control legislation: (i) Community law for transactions falling outside the scope of Spanish national law because they are above a certain turnover; and (ii) Spanish national law, for transactions that basically affect national markets and exceed certain thresholds.

Depending on the territory affected by the planned transaction, one or other concentration control legislation (European or national) will apply. Thus, if the transaction is deemed to have a Community dimension, it will be subject to Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (the "EC Concentration Regulation") and its implementing legislation. If, however, the transaction does not exceed the thresholds required for it to have a Community dimension, it may fall under national law. Accordingly, the various national concentration control laws must be checked. In Spain the applicable law is Antitrust Law 15/2007, of July 3, 2007 (the "Antitrust Law"), and its implementing legislation.

If the thresholds specified in the Antitrust Law are met, there is an obligation to notify the Spanish National Markets and Antitrust Commission (the "CNMC") of the transaction. The notification must be made before the transaction, which cannot be completed until it has been expressly or implicitly approved by the CNMC.

The Antitrust Law treats acquisitions of control between companies as concentrations, and takes the definition contained in the EC Concentration Regulation as a basis. Article 7.1 of the Antitrust Law states that a business concentration occurs where a stable change in all or part of one or more companies takes place as a result, among others, of the acquisition by a company of control over all or part of one or more companies.

The Antitrust Law applies to concentrations between active companies in Spain that meet certain thresholds, regardless of the parties' nationalities or where the transactions were performed.

As for the thresholds, the concentration control procedure will be obligatory in Spain where a business concentration does not have a Community dimension as defined in the EC Concentration Regulation and it satisfies at least one of the following tests: (i) as a result of the concentration a market share must have been acquired which is equal to or higher than 30% of the relevant market for the product or services within the national market or in a geographical market defined within it, unless the aggregate turnover in Spain of the acquired Company or assets in the previous year was not higher than 10 million euros, as long as the participants do not hold an individual or joint market share equal to or higher tan 50% in any of the relevant markets, either nationally or in the previously defined geographic scope; and (ii) the aggregate turnover in Spain for all of the participants must have exceeded 240 million euros in the previous fiscal year, provided that at least two of the participants have individually in Spain a turnover of more than 60 million euros.

Before filing a notification, the parties can file a ruling request with the CNMC if they have doubts as to whether a certain transaction qualifies as a concentration or exceeds the minimum thresholds for obligatory notification.

As indicated above, the business concentration cannot be performed until it has received the express or implied clearance from the antitrust authorities. In certain circumstances, however, the CNMC can lift the stay on performance of the concentration. An application to lift the stay on the transaction can be made at any point in the notification procedure and, if the CNMC decides to lift the stay, it could lay down certain conditions and obligations that will secure the enforceability of the decision that is ultimately adopted.

The completion of a concentration requiring control clearance before the express or implied decision clearing it or lifting the stay attracts a penalty of up to 5% of the total turnover of the infringing company in the year immediately before the year in which the fine was levied. Coercive penalties may also be levied.

7. ACQUISITION AGREEMENT

The clauses of the acquisition agreement will vary according to the type of acquisition (share acquisition or asset and liability acquisition) and to the specific circumstances of each case, although in every acquisition there will be a series of common clauses containing the typical terms of an acquisition agreement. Before analyzing the typical clauses of an acquisition agreement, it must be recalled that, as mentioned above, in Spanish practice the wording of acquisition agreements has been very influenced by Anglo Saxon legal practice and therefore acquisition agreements are usually very long agreements with a very similar and uniform appearance.

As for the structure of the agreement, after stating the place and date of signature and under the heading "*Reunidos*" (the equivalent of by and between) the appearing parties are identified and the capacity in which they act, which is followed by the "*expositivos*" or recitals which state the reason for the agreement and finally, the clauses or terms of the agreement appear. It is also usual practice for such a long and complex agreement to have a table of contents.

In Spanish practice, the typical contents of an acquisition agreement are as follows:

(a) Definitions clause

Usually the first clause in an acquisition agreement is a definitions clause containing a list of all of the defined terms that are to be used in the agreement. If the list of definitions is very long it is often included in a schedule to the agreement. It is also common not to include a specific definitions clause and to define the terms as they appear in the agreement.

(b) Subject-matter of the agreement

This clause is essential in Spanish law as it defines what is being transferred. In the case of a share acquisition the shares being transferred will be defined clearly along with whether they are transferred free of charges and encumbrances. In the case of an asset and liability purchase it will be necessary to set out clearly which assets and liabilities are being transferred. In this case, it is common practice for the clause to refer to a schedule in which the exact assets and liabilities transferred are listed.

(c) Price and method of payment

This clause states the price that the purchaser must pay to the vendor in consideration of the subject-matter of the agreement, and the payment method. In most cases, the consideration will consist of the delivery of money, in cash or in installments.

It is usual practice, especially in purchases with a deferred closing, for the parties to include a price adjustment clause to increase or decrease the price based on various parameters (e.g. net debt). Where price adjustments are included in an agreement, it is essential that exact definitions of the mechanisms and procedures which will be used to make those adjustments be stated in the agreement. In practice these price adjustment clauses have been, and are, used as a mechanism to reduce the purchase price.

(d) Transaction closing

Although the signing and performance of the acquisition agreement may take place simultaneously it is usual practice, due to the complexity of these agreements, for them to take place in two phases; the signing of the purchase agreement and, at a later date, the closing of the transaction.

The closing clause sets out the steps that must take place between the signing date of the agreement and the transaction closing date. There are many and very varied reasons for deciding to have the closing after the signing of the agreement. Some examples are (i) the need to obtain consent from third parties or authorizations from public agencies (e.g. from the antitrust authorities, from the foreign investment authorities or from the energy, telecommunications, insurance or banking authorities, among others); (ii) the need to obtain financing; (iii) the steps needed to adjust various issues identified in the due diligence; and (iv) the transfer of various assets of the target company which are not used for the business or are not wanted by the purchaser, and as a result are sought to be removed from the acquired company.

It is usual practice for these steps or legal transactions which must take place between the signing date of the agreement and the transaction closing date, or simultaneously with the closing, to take the form of conditions precedent, without which the closing cannot take place and, therefore, the agreement cannot become enforceable.

It is also common for this clause to state the date and place for the closing and the notary that will notarise the agreement. Similarly, a list is often included of the documents that the vendor must deliver to the purchaser (e.g. the official company's books, share certificates, directors' letters of resignation and other important original documents).

Moreover, the parties usually agree, as a condition for the closing, that the vendor must reproduce, on the closing date, the representations and warranties given to the purchaser at the signing of the acquisition agreement and it is recommendable for the agreement to state that if there are any material changes between the representations and warranties made at the signing of the agreement and those made on the closing date, the purchaser may terminate the agreement.

Another standard practice if there is a deferred closing is for the acquisition agreement to include a clause in which the vendor undertakes, in the transitional period between the signing of the agreement and the closing of the transaction, to continue with the company's activity in the normal course of its business and not to carry out certain steps that might be considered to fall outside the normal course of business or to be extraordinary activities (e.g. the distribution of dividends or reserves at the company, bylaw amendments, placing encumbrances on the company's shares or assets, making material changes to the working conditions of employees, mergers, alterations of corporate form, spinoffs, dissolving or liquidating the target company, among others) without the prior express consent of the purchaser.

(e) Representations and warranties

In Spanish practice, most acquisition agreements contain a long list of representations made by the vendor to the purchaser on various issues relating to the target company or the transferred assets and liabilities, accompanied by the vendor's assurance to the purchaser that they are true. They may appear in the agreement itself or, if very long, be attached to the agreement in a schedule. Representations and warranties are usually given by the vendor to the purchaser but there may also be representations and warranties by the purchaser to the vendor (usually much shorter).

The inclusion of long lists of representations and warranties in the acquisition agreements once again comes from Anglo Saxon practice.

The aim sought by providing representations and warranties in the agreement is to extend the vendor's liability to include any contingencies that may appear at the company after it has been sold and result from steps taken before the purchase. The seller assumes responsibility for the truth of the representations it makes and may be held liable in this respect.

It is highly recommended, from the purchaser's standpoint, for the purchase agreement to contain representations and warranties by the vendor because the redress mechanisms provided in Spanish civil law for contingencies occurring after the purchase, as a result of steps taken before the purchase, pose certain difficulties in practice for the purchaser.

The typical contents of the representations and warranties given by the vendor to the purchaser in an acquisition agreement are described below (this summary of typical contents is not intended to be finite and other representations and warranties apart from those set out below could be added):

(i) Sellers' capacity, Ownership of the shares/assets

The sellers represent and warrant that (a) they have full capacity to enter into and fulfill the agreement, and that it does not violate any legal or governmental provision, agreement, contract or commitment obligating them; (b) they are the only lawful owners of the shares and the shares are free from any type of restriction, encumbrance, charge, retention of title, options and third-party claims; and (c) the execution of the relevant deed of purchase will confer on the purchaser absolute ownership of, and unconditional legal title to, and possession of, the shares.

(ii) Incorporation, capacity and bylaws of the target company

The sellers represent and warrant that (a) the acquired company is properly organized and exists under the laws applicable to it and has sufficient legal capacity to own and conduct the business composing its current activity as determined in its bylaws; (b) the company's bylaws are those that appear at the Commercial Registry and there are no agreed changes to them that have not been registered at that registry; (c) the company has not resolved to alter its corporate form, be dissolved, merge or perform a spinoff; (d) the company has complete freedom to conduct its business and there are no commitments to any director, shareholder, or entity in which it has interests, or relationships with third parties, on non-arm's length terms, or which ought to be brought to the attention of a potential investor in the company; (e) the company is not, and has never been, a director of any company; and (f) there are no resolutions approved by the company's bodies that have not been registered at the Commercial Registry.

(iii) Capital stock, shareholders' agreements

The sellers give representations and warranties as to the company's capital stock and the shares into which it is divided, as well as that there are no capital increases or reductions to be registered or in progress. They also represent and warrant that all the rights and obligations of the company's shareholders are included in the bylaws which are registered at the Commercial Registry and aside from such rights and obligations, there are no rights, obligations or commitments of any type which could affect the sellers or the purchaser in any way. Lastly, agreements usually include a representation that the company does not own any securities of any kind, including, without limitation, shares and debentures issued by any other company or public or private organization.

(iv) Managing bodies, powers, auditors

The names of the members of the managing body are supplied, usually in a schedule, along with their dates of appointment and registration at the Commercial Registry and the vendors represent and warrant that no appointment, resignation or removal of any director is pending registration at the Commercial Registry, that the company has not given any undertaking to provide compensation or indemnity in cash or in kind in the event of removal or resignation of its directors, and that the company does not owe any sums whatsoever to its directors.

A list is also provided in the agreement, usually in a schedule, of the powers conferred by the company with a representation by the vendors that there are not any other powers conferred by the company that could bind it.

Where applicable, the vendors may represent and warrant that the company has made the proper appointment or reelection of auditors, within the stipulated legal period and that their appointment or reelection has been properly registered at the Commercial Registry.

(v) Financial statements and books of account

A copy of the company's financial statements as of a certain date is attached in a schedule to the agreement and the vendors represent and warrant that they present fairly the company's financial and net worth position as of that date, under generally accepted accounting principles and standards in Spain and in conformity with the accounting legislation in force on the date to which the financial statements relate.

The vendors usually represent and warrant also that (i) aside from those that have been recorded or for which due provision has been made in the financial statements, there are no other obligations to third parties, including to the vendors or to any person related to the vendors, or debts, or liabilities, or payments, or contingencies of any kind, which could affect the company's net worth or its income; (ii) from the date of the financial statements to the date of the signing of the agreement no material event has taken place outside the normal course of the company's business that could cause a material change to the company's net worth and financial position or directly or indirectly obstruct the company's normal activity, and the company has been run with the standard of care of a good businessman; (iii) between the date of the financial statements and the date of the agreement no events have occurred which could affect the going concern principle; (iv) upon the signing of the agreement, the company's net worth is not lower than the figure per the financial statements; (v) the company does not own shares, or hold shares as security, nor has it provided financial assistance for the purchase of own shares or created cross-holdings, all either directly or through an intermediary; (vi) the company has not provided any bonds, security or guarantees of any kind to third parties, nor is there any security provided by the company to secure the vendors' obligations to third parties; (vii) the company keeps the official books it is required to have by law up to date and in line with current legislation; (viii) the company has deposited all of its annual accounts at the Commercial Registry in due time and form and they were prepared in due time and form by the company's managing body and approved by the shareholders' meeting; (ix) the vendors have paid the company any and all of the sums they may have owed to the company; and (x) the company does not owe as of the date of the agreement any sum whatsoever to the vendors.

In addition, agreements usually include a schedule with the names and addresses of the banks holding the company's accounts, the balance and a list of the persons authorized to draw funds at each of them, the credit facilities that the company holds as of the date of the agreement, together with any security provided by the bank in favour of the company, including guarantees.

(vi) Taxes and social security

On this subject, the vendors represent and warrant to the purchaser, basically that the company has been in compliance at all times with the provisions of tax and social security law and that all returns and documents required by law have been filed with the competent authorities within the legal term, in connection with: (i) direct and indirect taxes, payable in Spain or, where appropriate, in other countries, dues and fees, special municipal taxes or any other taxes; and (ii) all Social Security contributions, employee welfare contributions or any other type of welfare charges which were payable under applicable law up to the date of the agreement.

It is also usual for vendors to represent and warrant, among others, that (i) the provisions for taxes and social security reflected in the company's financial statements are sufficient as of the date of the agreement; (ii) no tax or social security inspections or lawsuits are in progress or have been notified; (iii) the company is in compliance with its legal and formal obligations in relation to the years open for inspection; (iv) the transaction under the agreement will not give rise to any taxation at the company or to the loss or forfeiture of any tax benefits or any specific tax treatment; and (v) no relief, subsidy, reduction or tax exemption granted to the company by the Spanish authorities may be revoked cancelled or withdrawn as a result of the performance of the transaction.

(vii) Receivables and main agreements

The vendors represent and warrant that (i) all the receivables held by the company against third parties are lawful and valid, were generated in the normal course of business and on an arm's length basis, and are collectible on their due dates.

In relation to agreements, the vendors usually represent and warrant that (i) all of the agreements in which the company is a party or beneficiary are valid, obligatory and enforceable by the company pursuant to their terms and none of them contravene any law or judgment; (ii) the company has not been in breach or in defective compliance with any agreements, nor has any event occurred which, by notice or due to the passage of time, could constitute a breach by the company, or by any party to the agreement; (iii) neither the sellers nor the company have received or issued a notice to the effect that the company, or the other party, as the case may be, is currently in a position of breach or requiring termination of an agreement; (iv) there are no agreements requiring the company to accept in the future any imposed purchase prices or restrictions to their respective trading freedom; (v) the company is not party to any agreement that could be cancelled, rendered invalid or terminated by a third party due to a breach of the legislation applicable to public contracts or on any other ground; (vi) the company is not party to any contract or agreement that could be cancelled or terminated by the other party or entitle third parties to do so, as a result of signing the agreement and performing the transactions it contemplates; and (vii) neither the sellers nor the company have received notification from any of their customers, suppliers or lenders disclosing their intent to stop or substantially reduce their commercial dealings with the company on any ground, including, without limitation, due to an unsatisfactory level of service or the transfer of the shares to the purchaser.

(viii) Intellectual property

A description is provided, usually in a schedule to the agreement, of the patents, trademarks, utility models, signs, and other forms of intellectual property, and of the unregistered know-how and knowledge owned by the company. The vendors represent and warrant in this respect that (i) all registrable rights have been properly registered in the company's name in the appropriate registers; (ii) the company is up to date with payment of the charges for those registers; (iii) those registrations have not been opposed for infringing other registrations or forms of intellectual property belonging to third parties; (iv) the company does not directly or indirectly infringe any other registrations or forms of intellectual property belonging to third parties; (v) the company has not given any permanent or temporary licenses to third parties to use any of the forms of intellectual property and nonregistrable know-how or knowledge; and (vi) all the trademarks used by the company are owned by the company.

(ix) Assets

Basically the vendors represent and warrant that the assets appearing in the financial statements exist, the company has absolute and unrestricted ownership of them, they are free of charges and other encumbrances, and usable in the normal course of the company's business.

(x) Inventories

On this subject, the vendors usually represent and warrant that the company's inventories are usable in the normal course of its business and that the company has a sufficient level of inventories to enable it to continue operating the business for several months running from the date of the agreement. In addition, they usually represent and warrant that all the company's suppliers have been paid in accordance with the payment terms agreed with them.

(xi) Insurance

The vendors basically represent and warrant that the company has proper insurance for the property it owns and the risks pertaining to the business, including the risk of occupational accidents, in accordance with the current legislation and customary practice in the industry; that it is up to date with payment of the related premiums, and is in compliance with all the obligations envisaged in the relevant insurance policies. They provide, usually in a schedule, a list of the insurance policies that have been taken out for the company, with the risks covered in each case and the agreed amount of indemnification.

(xii) Employment matters

The vendors basically represent and warrant that the company has been, and is, in compliance with the employment legislation and applicable collective labor agreements and, in particular, with its obligations in connection with occupational risk prevention.

They include, in a schedule, a list of the company's employees, which usually contain their salary and other forms of compensation, length of service, class and type of contract, professional category and working hours, and a list of the collective labor agreements and other terms applicable on a collective basis to the company's employees.

It is also usual practice for the vendors to represent and warrant that (i) neither they nor the company have acquired any obligation to change the working conditions contained in the schedule; (ii) all the company's employees are subject to the collective labor agreement legally applicable to them, by reason of the primary activity carried on by the company; and (iii) no labor inspections, claims or lawsuits are in progress or have been notified.

(xiii) Licenses and administrative authorizations

The sellers represent and warrant that (i) the company has obtained on a regular basis, and kept in force, all the permits, licenses, concessions, registrations in official registers or authorizations it needs to be able to use its properties and facilities and to conduct its business; (ii) the change in ownership of the company is not likely to cause, in itself, the withdrawal of such permits, registrations, licenses, concessions or approvals and that it will not be necessary to make extraordinary investments or fulfill costly commitments to keep them in force; (iii) neither the company's properties nor its facilities, or its products or the activities it carries on, violate, or have violated, any legal or administrative provision in connection with zoning, classified activities, antitrust matters, private security, consumer protection, the handling of foodstuffs, occupational safety and hygiene or any other legal or administrative provisions; (iv) the facilities and buildings where the company's activities are conducted are, and have been, in compliance with the zoning legislation in force and applicable at any given time and there are no facts that could affect its legal status in this respect in the future; (v) the company is, and has been, fully in compliance with all of the requirements and conditions laid down for the grant and keeping of any subsidies or government assistance or subsidies of any other type, and the change of ownership of the company will not give rise to the revocation or the obligation to return any subsidies or government assistance or subsidies of any other kind; and (vi) there are no administrative inspections in progress.

(xiv) Environment

The vendors basically represent and warrant that (i) the company is, and has been, in compliance with all the terms of the applicable environmental legislation and, in particular, with the legislation on discharge and dumping, waste, emissions, environmental health, land contamination and harmful or hazardous substances; and (ii) neither the vendors nor the company have received or been the subject of any notices, claims, inspections, applications or summonses, or been tried for an act or omission on the ground of a breach of environmental legislation, nor have they reached any voluntary agreements in relation to any penalties levied on them.

(xv) Lawsuits

The vendors represent and warrant that there are no proceedings, lawsuits, claims, or inspections under way against the company, or against its directors, in connection with the performance of their duties, and there are no proceedings, lawsuits, claims, or investigations regarding the sellers or the company by reason of their shares, other than any that may be listed in a schedule to the agreement.

(xvi) Real estate and personal property

Agreements normally include, in a schedule, lists of all the real estate owned by the company, of the buildings it holds under leases or subleases, and of the lease and sublease agreements executed and in force in which the company is party as tenant or landlord. The vendors usually represent and warrant in this respect that (i) there is no ground whatsoever that would entitle the respective landlords/sublandlords to carry out early termination of the above agreements; (ii) the company has absolute ownership all of its assets and personal property and real estate; (iii) all of its assets and property are in good working order and fit to be used efficiently for their intended purpose in the activity being conducted by the company; (iv) as of the date of the agreement the company has not created any security interest, including rights of usufruct or use, mortgages, pledges or any other forms of security in the assets pertaining to it, which are free from any charges or encumbrances; and (v) none of the company's assets have been transferred, leased or disposed of since the date of the financial statements outside the normal course of business.

(xvii) Other activities of the vendors

The vendors represent and warrant that they do not posses, by any means, directly or indirectly, any assets, business or interests in companies engaged in activities which could compete with those constituting the company's business.

(xviii) The company's business

The vendors represent and warrant that the company's business is, and at all times has been, run in accordance with good, sound and ethical business practices and in strict compliance with all applicable laws, regulations and permits.

(xix) Personal data protection

Representations and warranties are given that the personal data included in the filing systems controlled by the company and which are transferred or disclosed to the purchaser under the agreement are in conformity with the provisions set forth in the Spanish Data Protection Law and its related implementing legislation.

(xix) Misrepresentation

The vendors represent and warrant that none of the information supplied to the purchaser in connection with the agreement contains any inaccurate representations regarding any material fact, or omits any important data that could make the information concerned misleading.

They also state for the record that the representations and warranties must be construed to have been made as of the date of the agreement, in relation to facts occurred before the signing of the agreement, unless expressly determined otherwise in any specific case.

As a result of the examinations carried out in the due diligence process or at the initiative of the vendor, disclosures could appear throughout the agreement that may change or clarify the representations or warranties given by the vendor. It is very important for it to be determined whether these disclosures are exempt from the vendor's liability or whether, conversely, the vendor will also be liable to the purchaser in the event of a loss that could arise as a result of any such disclosure.

(f) Indemnification, security

In this clause it is usually stated that, based on the acknowledgement that the data, information, representations and warranties given to the purchaser and set forth in the agreement and its schedules, are the basis on which the purchaser has taken the decision to execute the acquisition agreement and perform the transaction it contemplates, the vendor agrees to hold the purchaser and the acquired company harmless from any contingency (normally defined as a "loss") on the terms and conditions that the parties agree in that same clause. It is very important, from the purchaser's standpoint, for this clause to be included in the agreement because it states the reason for the agreement and makes it clear that the representations made by the vendor are essential for the purchaser.

The term "loss" is given a broad definition in the agreement, and usually includes any financial loss that may be caused to the purchaser and/or to the company, consisting of the expenses, debts, taxes, fines, liabilities, claims, losses or contingencies that may result from a breach of any of the contractual obligations acquired by the vendors in the agreement and/or stem from any misrepresentation, inaccuracy or breach in connection with the representations and warranties contained in the agreement and/or consist of a third-party claim originating from events prior to the agreement date.

It is usually stated that the beneficiary of any amounts payable as a result of a loss will be the purchaser or the company, at the discretion of the purchaser, and that if the purchaser is the beneficiary, any sums paid will be treated as a reduction in the price.

It is highly recommendable and usual practice for this clause to determine the notice procedure between the parties for losses and third-party claims against the company or against the purchaser that are likely to give rise to a loss. In the case of third-party claims, in addition to the terms on notices between the parties, other terms are usually added allowing the vendors to undertake the defense of the claim.

This clause also sets the limits on the vendors' liability which can be of two types: financial and time limits. The purchaser will predictably try not to have a financial limit placed on the vendor's liability although in practice a limit is usually agreed in an amount equal to all or part of the purchase price. Often, the parties also agree on a franchise amount or amount below which the purchaser cannot claim liability from the vendors. If a franchise amount is agreed, it is important to determine how it will operate (e.g. whether in claims over and above the amount of the franchise the seller must be liable from the first euro or whether the amount up to the franchise remains exempt in all cases). Regarding time limits, the parties usually agree that the applicable legal statute of limitations will apply to tax, employment and social security claims while shorter periods are usually agreed for other types of claims. It is usually agreed in all cases that, if a third-party claim is notified within the liability period, that period will be extended until the claim has been decided upon and, where applicable, the purchaser and/or the company have been properly indemnified.

One last point to make is that to secure payment by the vendor to the purchaser for any losses that might arise, it is usual practice for the vendor to provide certain types of security to the purchaser. The most commonly used forms of security are a first-demand bank guarantee, an escrow, retention of a portion of the price, or, to a lesser extent, a security interest.

(g) Noncompete clause

Company acquisition agreements often contain this clause in which the vendor gives an undertaking to the purchaser that neither he, his family members up to the second degree of consanguinity, or entities controlled by them, will carry on, invest in, manage, run or control, directly or indirectly in Spain (or the territory agreed upon), within a given period of time from the date of the agreement, any activities that compete with those carried on by the company. In accordance with Spanish antitrust law, noncompete clauses are usually accepted for up to two or three years depending on whether goodwill is not transferred (two years) or it is (three years).

The parties usually agree on a sum of indemnification in the event of a breach of the agreed noncompete obligation.

(h) Governing law and dispute resolution

In this clause the parties determine the law that will govern and be used to interpret the agreement and the way in which the parties will resolve any potential disputes that may arise over the performance, application and interpretation of the agreement.

In general terms, the traditional methods for resolving disputes are the courts of justice and arbitration.

It is very common, however, for the parties to agree to negotiate in good faith, for a period of time, to try to resolve their differences amicably before turning to judicial resolution or arbitration. An alternative dispute resolution mechanism to judicial resolution or arbitration is mediation, in which one or more independent and impartial third parties help the parties find the best and fairest solution to end their discrepancies. In Spanish practice it is not very common for the parties to choose mediation as a mechanism for resolving their discrepancies and therefore we will focus on the two traditional dispute resolution mechanisms: judicial resolution and arbitration.

The choice of either the judicial or arbitration mechanism will depend on the circumstances of the case and the wishes of the parties, and it is impossible to say generally which of those mechanisms it is better to choose over the other.

The main advantages of an arbitration proceeding over a judicial proceeding are speed (a nonappealable decision can be obtained in a shorter period than from the court authorities), the expertise of the arbitrators (they are usually technical experts on the matter under dispute) and the confidentiality of the process (compared to the public record of court proceedings).

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