THE ACQUISITION OF AN EXISTING AMERICAN COMPANY OR AN OWNERSHIP INTEREST THEREIN:

A Short Practical Guide for the Foreign Business Person and Foreign Lawyer

By

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About the Author
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Services of Gallet Dreyer & Berkey, LLP

Gallet Dreyer & Berkey, LLP (“GDB”) is a long established, well respected law firm based in the heart of New York City, offering a full array of legal and tax services. Among them are essentially all topics discussed in this Guide and many others. GDB is capable of serving clients with legal problems or matters anywhere in the USA and in connection with international legal matters. Examples of GDB’s fields of expertise include

- direct investments in the USA of all kinds, including acquisitions and mergers, joint ventures, setting up of companies and manufacturing facilities;
- contracts of all kinds;
- commercial law;
- law and contracts regarding construction and engineering projects;
- real estate;
- technology transfer and licensing; franchising;
- intellectual property;
- computer law and computer hardware and software contracts; internet law and contracts;
- banking law and transactions;
- securities law; financing law and transactions;
- visas and immigration;
- tax law and tax planning;
- litigation, mediation and arbitration
- sports and entertainment law.
Introduction

An entire, lengthy book could be written about this subject. It is a complex one, with many aspects, subtopics and perspectives. The magnitude of the acquisition and of the parties involved will affect the legal, tax, financing and other considerations. Smaller acquisitions will not normally be subject to the same complexities as larger ones. If the acquisition target is a public company (e.g., its shares are traded on a stock exchange), certain rules and regulations must be taken into account. The contemplated purchase of a minority interest in a U.S. company often generates issues not presented when an entire company or a majority interest will be acquired.

In this overview, it is not possible to discuss all or even nearly all of the ramifications of acquiring an existing U.S. company or an ownership interest therein. Rather, I can and do only focus on some of the pertinent points. And, they are presented only as a rather simplified overview, mainly for the non-lawyer.

LEGAL FORM OF THE ACQUISITION

There are, in general, three ways in which the acquisition of a company (the "Target Company") can be accomplished:

- you can form a U.S. subsidiary and cause it to merge or consolidate with the Target Company (statutory merger or consolidation);

- you can form a U.S. subsidiary and cause it to acquire all or a portion of the assets of the Target Company (assets acquisition);

- you can purchase all or a part of the shares of stock or ownership interests of the Target Company, either directly or through your U.S. subsidiary (stock acquisition).

Statutory Merger and Consolidation

The laws (statutes) of virtually all U.S. states provide for and allow the merger of two corporations or their consolidation. These acquisition techniques can, of course, only be used where the purchase already has its own U.S. corporation (or other suitable U.S. legal entity) available to participate in the merger or consolidation. A U.S. entity, typically, a corporation, can be quickly organized for this purpose if the purchaser does not own one. Many, if not most, U.S. state laws permit statutory mergers and consolidations between and among corporations formed in different U.S. states.

Statutory Merger
In a statutory merger, one corporation with all of its assets and liabilities, is merged into another corporation (the surviving corporation). After the merger, the merged corporation disappears and the other corporation is the surviving entity.

**Consolidation**

In a consolidation, two corporations consolidate all of their assets and liabilities, forming a new surviving corporation. Neither of the two consolidating corporations survive.

As distinguished from an acquisition of assets, the statutory merger has the advantage of greater simplicity. All assets and liabilities (including all contractual rights and obligations) are transferred to the surviving corporation by operation of law. This means, for example, that it will not be necessary for the merging company to sign numerous assignment documents for its various agreements and bills of sale for its assets. The statutory merger may offer certain important tax advantages for the seller.

Moreover, a statutory merger can often be consummated even over the protest of dissenting minority shareholders. Although the shareholders of both corporations involved in the statutory merger (or consolidation) must approve the transaction—in most U.S. states by a 2/3 vote of the outstanding share capital—generally the only remedy for dissenting minority shareholders is to have their stock appraised and then purchased at the appraised price.

One possible negative of a statutory merger or consolidation is that the surviving corporation will have assumed not only the assets and liabilities of the merged company or consolidated companies, but also any hidden or unknown liabilities. Even if representations and warranties against the existence of hidden or unknown liabilities are given by the merging or consolidating companies, they would normally not survive after the merger or consolidation. One possibility is to have the shareholders of the non-surviving corporations make such warranties and have them survive for an agreed time.

**Assets Acquisition**

In an assets acquisition, the buyer acquires all or certain defined assets of the Target Company. Among the potential advantages of an assets acquisition are:

- The buyer acquires only those assets of the Target Company that it desires.

- The buyer does not normally assume the obligations and debts of the Target Company, unless by contract the buyer agrees to assume all or some of them. In certain cases, however, where the buyer continues the same business as the Target Company with most of its employees, the Target Company ceases to function, and possibly other criteria are present, the assets purchasing entity may be found liable for certain of the obligations and debts of the Target Company.
• The assets buyer does not inherit any unwanted minority shareholders of the Target Company.

• Where the assets selling company survives the sale and is quite solvent, any representations and warranties made by it to the buyer in connection with the sale will, if the agreement so states, survive. Thus, any claims which might arise out of any misrepresentation or breach of warranty can still be asserted against the selling company after the consummation of the deal (depending, of course, what the assets purchase contract states).

Possible disadvantages of an assets purchase are:

• The buyer will normally not be able to obtain the benefits of the Target Company's existing contracts without the consent of the other contracting party (unless, for example, the contract permit the Target Company to assign without such consent).

• The assets buyer will not automatically acquire, and may not be able to purchase as separate assets, certain permits, licenses and government approvals granted to the Target Company.

• In an assets purchase agreement, each individual assets to be acquired must be segregated, described, and transferred. That can sometimes make for a long and tedious set of documents. Certain purchased assets, like patents, trademarks, and copyrights etc., will require special documents which must be filed with the corresponding authority (e.g., the U.S. Patent and Trademark Office).

• Many assets acquisitions will require compliance with state "bulk sales laws", that is, preparation of various forms/documents and their filing with the appropriate state authority. These laws are designed to protect creditors of the Target Company where certain types of assets are being transferred. Sometimes, the parties agree to not comply with those laws and make sure that the creditors are paid off.

• In certain situations, the seller may be reluctant to structure the deal as an assets purchase due to U.S. tax considerations. For example, the Target Company or its owners may be subject to tax on the gain from an assets sale. As a general rule, for tax purposes, the buyer prefers to purchase shares of stock or ownership interests, not assets, and the seller prefers the converse.

Let us return to a point already mentioned. The general rule is that the buyer of a Target Company's assets does not, under the laws of most U.S. states, assume or take over the obligations, liabilities and debts of the Target Company, unless the purchase contract otherwise states. However, case law in some U.S. states and a few federal statutes and case law have carved out some important exceptions. Roughly and generally stated, when the buyer carries on
essentially the same business as the Target Company with the acquired assets and other
elements (e.g., the Target Company's key personnel) and particularly, where the Target
Company has been liquidated or rendered an empty shell, the courts of some states will hold
the buyer liable for all or certain of the obligations, liabilities and debts of the Target Company.
Product liability is just one type of claim where this principle can come into play. Also, in the
area of environmental liability, under both federal statutes and many state laws, a new owner of
a business or certain assets (e.g., land) will incur this sort of successor liability even if it does
not carry on essentially the same business as the Target Company did or does.

It is important for the assets buyer to have its counsel research successor liability well in
advance. Likewise, with respect to potential environmental liability; and in connection therewith,
to have the appropriate environmental studies done prior to closing an acquisition of any type
(possibly, before even signing the acquisition agreement). If the potential buyer decides to
proceed to negotiate the deal, sufficient protection against these (and other) risks should be
built into the acquisition agreement, from the buyer's standpoint.

Stock Acquisitions

When a company is acquired through the purchase of its stock, the parties to the acquisition
agreement are the buyer and the selling shareholders. This is probably the most common form
of acquisition, especially of privately owned corporations. A stock acquisition can be carried out
in the following ways, generally speaking:

- private purchase of the shares of one or more existing shareholders;
- purchase of stock on a U.S. stock exchange;
- public takeover bid or tender offer, which can be either "friendly" or "unfriendly".

In any takeover of a U.S. company whose shares are publicly traded, the U.S. federal and
state securities laws must be complied with. That also applies where the buyer intends to pay
for the shares or assets of the Target Company with its own securities (e.g. stock).

It is worth emphasizing that a stock acquisition for cash is normally a taxable transaction for
the selling shareholders. Thus, the buyer may have to pay a higher price to, in effect,
compensate the seller(s) for those income taxes. And, in contrast to an assets purchase, the
buyer of stock does not acquire a new depreciation basis for the Target Company's assets.
Buyers, therefore, will generally want to purchase the Target Company=s stock or ownership
interests, whereas sellers will usually push for an assets sale.

Some of the other potential advantages of a stock acquisition, mainly from the buyer=s
standpoint, are:

- The essence of the deal is simply the sale of the stock by the existing
  shareholder(s) against cash and/or other assets. Neither the Target Company nor
its assets or liabilities are in any way affected by the transaction. Thus, there is no need for any specific transfers or assignments of any of the US Target Company’s contracts or assets (though the selling shareholder(s) will often represent and warrant that, in effect, the specific assets of the Target Company exist and are owned by it free and clear of all impediments except as otherwise stated).

- The buyer is normally dealing directly with the particular selling shareholders (at least in a private company acquisition) and there is, normally no legal requirement that shareholders approve the purchase by a shareholder majority.

- As distinguished from the statutory merger or the acquisition of assets, shareholders refusing to sell their shares have no appraisal rights, that is, no right to have their shares appraised and purchased at the appraised value.

- Since the acquired Target Company itself may not be a party to, or otherwise directly involved in, the stock purchase transaction, management of the Target Company has, except in a "tender offer" stock acquisition (described briefly below) no legal means of preventing or interfering with the stock purchase.

Some of the potential disadvantages from the buyer’s side are:

- By a stock acquisition, the buyer indirectly acquires the company as a "going concern" with all its assets and liabilities. Thus, the buyer will indirectly acquire all of its undisclosed or hidden liabilities (e.g., environmental, product liability, other third party liabilities or claims, product recall expenses, tax liabilities). True, the buyer will normally protect itself against undisclosed or hidden liabilities by extensive representations and warranties and/or covenants of the selling shareholder(s), placing in escrow or holding back a significant part of the purchase price for an agreed time period to cover such liabilities. However, there is a risk that those measures may not be sufficient; or, that the selling shareholder(s) will not have the funds or will otherwise resist honoring their contractual obligations.

- To the extent the buyer cannot persuade all shareholders of the Target Company to sell their shares to it (assuming the buyer wants to buy all shares), the buyer will have to live with one or more minority shareholders. There is at least some risk, especially if the buyer will be conducting various business operations with the Target Company, that the minority shareholders could object to some of them, including agreements between the buyer (or other of its related companies) and the Target Company, on the basis that they are not dealing "arm's length". In this same vein, minority shareholders may have certain rights by law that the buyer cannot avoid, and that could cause difficulties. One, but only one, possible problem is that one or more minority shareholders may be able to block the majority shareholder(s) from taking or not taking certain action.
TAX ASPECTS OF ACQUISITIONS

The U.S., foreign and international aspects of any acquisition should be carefully evaluated before entering into any deal. The U.K. - U.S. income tax convention will often be an important tax planning tool. Other income tax conventions concluded by the USA and the United Kingdom may also come into play.

ACQUISITION FINANCING: SOME TAX CONSIDERATIONS

Here are a few points to consider:

! If the buyer intends to use external borrowing to finance the acquisition it might consider (i) placing the debt in a country in which the interest will generate the greatest tax benefit—usually a country with a high effective income tax rate; and (ii) using a U.S. holding company to place the loans, since if a consolidated U.S. tax return is filed by that company together with the acquired company, the interest expense of the borrowing company can reduce the acquired company's taxable income.

! If the buyer intends to finance the company internally, it might consider (i) use of intercompany, interest bearing loans to shift income outside of the USA; (ii) using a U.S. holding company to acquire a U.S. Target Company and capitalizing the holding company with part equity and part debt, thereby enabling the holding company, if a consolidated U.S. tax return is filed, to claim interest deductions offsetting the U.S. Target Company's post-acquisition income. There will normally be a lower U.S. withholding tax on interest paid by a U.S. holding company to its non-U.S. parent than on dividends.

There are, however, strict U.S. tax rules governing interest deductions between related companies, in particular, between a non-U.S. parent company and its U.S. subsidiary. These must be closely examined as part of the tax planning process.

STOCK ACQUISITION THROUGH TAKEOVER BID OR TENDER OFFER

Here again, these are complicated subjects about which only brief comments are offered.

Tender Offers

Particularly where the shares of the US Target Company are held by a large number of shareholders, the prospective buyer may wish to consummate the share purchase through a so-called "tender offer". The tender offer is made directly to the shareholders of the US Target Company, frequently through prominent notices in one or more newspapers, though other means are also used.

A friendly tender offer is one where the attempted share purchase is supported by the management of the US Target Company. Typically, management will recommend in writing to shareholders that they accept the tender offer.
A hostile tender offer is one opposed by management. Management will frequently advise shareholders of its opposition, setting forth specific reasons.

U.S. companies, particularly larger ones, adopt certain measures to prevent hostile takeovers.

There are extensive legal requirements that must be met for "tender offers".

**Anti-Takeover Bid State Laws**

Several U.S. states have enacted anti-takeover laws. Examples are Delaware, New York and New Jersey, though there are many others. While limitations of space do not permit a detailed, state-by-state discussion, or for that matter, any detailed treatment of this subject, two of these laws are very briefly discussed.

The New York law covers takeover bids (as defined) to acquire equity securities (essentially, voting stock) of New York target companies. Target companies include corporations organized under New York State law or those having their principal place of business and substantial assets in that State. When commencing a takeover bid, the offeror must file with the New York State Attorney General and submit to the target company a detailed registration statement. The Attorney General can investigate or conduct public hearings on the proposed takeover within a specified period after the filing, and give its ruling within a specified period. The Attorney General can prohibit the making or continuation of the takeover bid until the offeror complies with the law. There are criminal and civil penalties for violations.

New Jersey's law states, in very brief overview, that by a specified time before any takeover bid is made that might permit the offeror to acquire over 10% of the New Jersey target company's equity stock (including shares presently held by the offeror), the offeror must (i) file a rather detailed form with a particular State office and send a copy to the target company; (ii) file with that office a written consent to service of process in New Jersey; (iii) publicly disclose the material terms of the proposed takeover offer to leading wire services for the financial press; and (iv) not make a takeover bid without the consent of that office's chief (which may be after public hearings are held). Copies of essentially all advertisements, circulars, letters and materials issued by the offeror or the New Jersey target company soliciting acceptance or rejection of the takeover bid terms must be filed with that office, and must not be false or misleading. Violations of the law can result in criminal and civil penalties. The definition of a New Jersey target company includes a corporation formed under New Jersey law or one with its principal place of business in that State.

**Takeovers, Mergers and Acquisitions by Foreigners that Threaten U.S. National Security**

A federal law permits the President of the United States or his designee to suspend or prohibit a takeover, merger or acquisition of a U.S. company by one or more foreigners ("foreign
persons") if, in his view, the proposed transaction threatens national security. If the transaction has already been consummated, he may order the foreign person(s) to divest themselves of the U.S. company concerned. Regulations exist defining "foreign person" and "U.S. person"; and providing guidance as to transactions are subject to that law and those not.

**U.S. FEDERAL AND STATE ANTITRUST LAWS**

Whenever Americans or foreigners (companies or individuals) plan a fairly large acquisition, takeover or merger in the States, they must notify the U.S. antitrust authorities of it and obtain a type of advance clearance from the U.S. federal antitrust authority. The pertinent regulations state the parameters and factors to determine whether, in any particular case, advance clearance must be sought. The Target Company, its owners and members of its group are normally considered one party; and the prospective acquirer, its owners and members of its company group are considered as another party (these are defined in the regulations). These rules are stated only in a general way, due to their complexity.

Except in the case of a "tender offer", all parties must file the pre-merger notification with the U.S. federal antitrust authorities (Federal Trade Commission = "FTC"; and the Antitrust Division of the U.S. Department of Justice = "DOJ"); in the case of a tender offer, only the prospective acquirer must file. There is a waiting period within which the transaction cannot be consummated, and the FTC or DOJ may object to the deal. That period can be extended if the FTC or DOJ requires additional information. Violation of the above rules, for example, the consummation of the deal before the waiting period expires or failure to file a complete and accurate notification can give rise to the issuance of a compliance order and the imposition of very high civil fines.

Once the waiting period has expired without any objection from the FTC or DOJ, the transaction can be consummated.

An acquisition, takeover or merger can also be attacked after its consummation based on alleged violation of the U.S. federal or a particular American state's antitrust laws (many states have enacted antitrust or antitrust-type laws applicable to the market sector in their particular state). Regarding federal antitrust laws (and many state ones as well) the fundamental issue, generally stated, is whether the acquisition, takeover or merger substantially may reduce actual or potential competition in the sector concerned, or creates or tends to create a monopoly, or results in an unreasonable restraint of trade. The U.S. antitrust authorities have published guidelines which may shed light on whether a particular deal is likely to cause antitrust problems. Both the FTC and DOJ have procedures permitting a party to a contemplated acquisition or merger to seek a prior (but non-binding) ruling that the transaction will not violate the U.S. federal antitrust laws.

Before any important acquisition, takeover or merger capable of affecting the U.S. market, the parties should consult their U.S. lawyers. They will review the proposed deal from an antitrust and other important standpoints as well (by way of example, securities law requirements, environmental and tax considerations).

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Also, any significant **joint venture** capable of affecting the U.S. commerce should also be examined in advance from a U.S. antitrust standpoint. Most of the points made above apply to joint ventures too. American antitrust authorities tend to treat joint ventures somewhat more leniently than acquisitions, takeovers and mergers.

Not only the U.S. government authorities, but third parties as well can attack mergers, acquisitions, takeovers, and joint ventures based on violation of the U.S. federal and/or state antitrust laws. They can, for example, attempt to sue for triple damages in certain instances.

**TYPICAL STOCK PURCHASE OF A PRIVATELY OWNED U.S. COMPANY: KEY EVENTS**

Such a deal generally begins with negotiations between the potential buyer and potential selling shareholder(s) regarding the substance of the deal. During this stage, a great deal of financial, commercial and legal information/documents will have already been elicited from the seller(s) and are used as a basis for establishing the purchase price.

Often, as a preliminary step to the acquisition agreement, a legally non-binding letter of intent will be prepared and signed, setting forth major elements of the contemplated acquisition. It will, typically, serve as a starting point for preparing the acquisition agreement documents. In most cases, the prospective seller(s) will want the prospective buyer to sign a "secrecy agreement" because the latter will, in all likelihood, receive and learn confidential information of the Target Company.

The buyer must satisfy itself by means of a detailed audit and examination of the Target Company that the Target Company's situation (as set forth in the stock purchase agreement) is accurate (so-called "due diligence"). This process typically involves conducting a financial audit of the Target Company by an independent accounting firm; its physical assets checked by architects, engineers, and environmental experts; and its legal status and various legal arrangements and contracts examined by the buyer's U.S. lawyers. The "due diligence" procedures are sometimes completed before the acquisition agreement is signed; sometimes, after signature but in any case, prior to the "closing". In the latter case, the closing will be made contingent upon the seller(s) meeting certain conditions and the representations, warranties etc. they make in the agreement being true and accurate at the time of closing and, at least for certain of them, for an agreed time after closing.

If the "due diligence" processes reveal no serious or insurmountable irregularities, the acquisition agreement will be signed (unless signed prior to "due diligence" completion). The actual sale is consummated at a closing, at which the Target Company's purchased shares of stock are delivered to the buyer and the buyer pays the purchase price. Frequently, a portion of the purchase price (e.g. 20%, though it might be more or less) is not paid directly to the seller(s) but is, for example, withheld by the buyer or placed into "escrow" with a third party or the buyer=s or seller=s lawyer (typically, the buyer's). That portion is held as security for the buyer against the appearance, after the closing, of undisclosed claims or liabilities arising out of the
conduct of the company's business prior to the closing or its ownership/occupancy of land (e.g., environmental liability). Assuming no such claims or liabilities exhaust it, the portion of the purchase price withheld or escrowed will normally be released to the selling shareholder(s) over, e.g., a 2-3 year period, possibly in annual installments.

THE STOCK PURCHASE AGREEMENT: SELLER'S REPRESENTATIONS AND WARRANTIES AND OTHER KEY TERMS

REPRESENTATIONS AND WARRANTIES

The seller(s)' representations and warranties are among the most important provisions of the stock purchase agreement. In essence, they function as an extremely detailed description of the property, financial condition, agreements and business condition of the Target Company. The buyer relies on those representations and warranties in agreeing to purchase the shares of stock of the Target Company and to pay the agreed purchase price. A very general, conceptual idea of some of those clauses follows. I emphasize the word "some". The wording is not intended as a guide for how those clauses should or would be written. It is the concepts I am trying to illustrate. Also, these illustrations are focused mainly on a rather straight forward, rather uncomplicated, friendly acquisition of the shares of a privately owned Target Company. Naturally, each stock acquisition has its own features, and the provisions, including representations and warranties, will vary from case to case.

Sellers hereby, severally and jointly, represent and warrant to the purchaser as follows:

Corporate Standing and Powers

The Target Company is a corporation duly organized and existing under the laws of the State of (U.S. state of incorporation) and is in good standing thereunder. The Target Company is duly qualified (registered) to conduct business in all U.S. states where, in light of its present activities, such qualification is required. Copies of its Certificate of Incorporation, Bylaws, a Good Standing Certificate in its state of incorporation and in all states where it is qualified to conduct business, are attached as Exhibits ......hereto.

Capital Stock

The issued and outstanding capital stock of the Target Company consist of ...shares of common, voting stock with a par value of $... each [or, e.g. common, voting stock without par value]. The present ownership of the capital stock is as follows:

<table>
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<tr>
<th>Name of Owner</th>
<th>Number of Shares Owned</th>
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All shares of capital stock of the Target Company have been full paid, are non-assessable and are held free and clear of all liens and encumbrances.
Financial Statements

Attached hereto as Exhibits...... are the balance sheets and the related profit and loss statements of the Target Company for the periods......Such financial statements have been prepared in accordance with generally accepted accounting principles, applied on a consistent basis, and present and true and complete statement of the financial condition of the Target Company as of their respective dates and its operations for the relevant periods.

Title to Assets

Except as sold or otherwise disposed of in the ordinary conduct of its business since the date of the [latest] balance sheet attached hereto as Exhibit ...., the Target Company is the owner of and has good and marketable title to all the properties and assets tangible or intangible, reflected in said balance sheet, free and clear of all encumbrances [except as noted in ....].

Condition of Building, Machinery and Equipment

The essence of this clause is that it assures the buyer that the buildings, machinery and equipment of the Target Company are in good repair/working order, and are free from any hidden defects, liens, encumbrances, etc.

Accounts Receivable

By this provision, the seller(s) will represent and warrant that the Target Company's accounts receivable, reflected in the latest balance sheet, have been collected or are collectable in the amounts shown.

Inventories

In this provision, the seller(s) represent and warrant that the inventories shown in the Target Company's latest balance sheet are salable and usable, the valuation method used to reflect their value, etc. etc.

Intellectual Property

If the Target Company owns any trademarks, patents, or other intellectual property, the seller(s) will represent and warrant such ownership and a complete schedule thereof (Exhibit) will be a part of the stock purchase agreement.

Contracts and Unilateral Obligations

A list of all (or all material) contracts, agreements, promissory notes and other unilateral obligations and commitments of the Target Company will be an Exhibit to the stock purchase
agreement. The seller(s) will represent and warrant that complete and current copies, with all amendments, of all of those have been delivered to the buyer.

Absence of Undisclosed Liabilities

The seller(s) will normally represent and warrant that the Target Company has no undisclosed liabilities of any kind, that is, none other than those liabilities shown on the last balance sheet. A specific representation and warranty is also customarily made as the Target Company having no tax liabilities.

Often, as to potential environmental law liability that may arise after the closing but due to pre-closing conditions, the parties reach agreement covering several pages of text as to how that risk will be dealt with. That text may not be in the representations and warranties section of the purchase agreement, but be placed in a separate section and be worded as covenants, rather than representations and warranties. The same can apply, for example, to post-closing product liability or similar claims arising from the conduct of business prior to closing.

Absence of Litigation

There are no litigations, arbitrations, prosecutions, governmental actions, proceeding or investigations, pending, imminent or threatened against the Target Company or any of its officers, directors or shareholders.

Subsidiaries of Target Company

If the Target Company has any subsidiaries or affiliated companies that are being acquired through the purchase of the Target Company shares, then a number of representations and warranties applicable to those subsidiaries or affiliates will normally be required. The same will apply if the Target Company owns any participations (e.g. minority ownership) in any other firm or enterprise.

Correct and Complete Information Supplied

The seller(s) will expressly represent and warrant that all information and documents supplied to the buyer are correct and complete.

As stated above, there will often be a litany of other representations and warranties that the seller(s) will give the buyer. Also, the buyer will typically make certain representations and warranties to the seller(s).

The stock purchase agreement will typically also provide that the representations and warranties (or at least a great many of them) are made by the seller(s) both as of the date of signature of the agreement and as of the closing date; and may provide that they survive the closing for an agreed period of time. The survival of all or most of the seller(s)' representations
and warranties for a sufficient long period after the closing is usually of critical importance for
the buyer.

AGREEMENT TO BUY AND SELL SHARES AT CLOSING

Here are a just some of the types of provisions dealing with that subject, directly or
indirectly. Again, I am attempting only to convey the sense, not how to word such provisions.

The seller(s) agree to sell and the buyer agrees to purchase the Target Company Shares
[of stock] at the Closing on the Closing Date upon the conditions hereafter set forth. (All
important terms, by way of example: "Target Company Shares", "Closing Date", must be clearly
defined in the stock purchase agreement.)

Purchase Price; Holdback or Escrow Provisions

Such clauses will deal with e.g., what the total purchase price is, to whom it will be paid (if
several sellers), the currency in which it will be paid, and when it will be paid (e.g. at the
Closing). Where applicable, it will provide for the buyer holding back part of the purchase price
or placing it in escrow (as discussed above). If a part of the purchase price will be paid at an
agreed time or times after the Closing, the agreement will so state. The buyer might execute
promissory notes for those deferred, post-closing payments.

Audit of the Target Company

Typically, the stock purchase agreement will state that by a certain date prior to the Closing,
the Target Company will undergo an audit by a specified certified public accounting firm. Often,
the buyer and seller(s) agree to divide the cost of the audit, 50%-50%.

Conduct of the Target Company's Business Until Closing

The selling shareholders will normally agree that until Closing, they will cause the Target
Company to continue to engage in the normal, day to day conduct of its business in the same
manner as theretofore. They will also usually agree not to permit the Target Company to do
anything unusual or extraordinary (e.g., enter into any unusual transactions or agreements, not
to dispose of any of its assets except in the ordinary course of its business, etc.).

Indemnity

The seller(s) will normally agree to indemnify the buyer for breaches of the seller(s)'
obligations, covenants, representations and warranties contained in the stock purchase
agreement. This is an important provision from the buyer's standpoint.

SEPARATE AGREEMENTS PART OF THE ACQUISITION AGREEMENT

PACKAGE

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It is not at all uncommon that in addition to the stock purchase agreement, other contracts are negotiated and executed as part and parcel of the acquisition. The possible types of "other contracts" are too numerous to mention.

I will mention one type by way of example. Frequently, the buyer wants certain key people connected with the Target Company to continue to work, whether as employees or consultants of the Target Company (or even of the buyer company). In fact, the buyer may be unwilling to go through with the acquisition unless those key people sign contracts to continue as employees or consultants. In that situation, the buyer will have to negotiate and conclude written contracts with those persons. They will be an integral part of the acquisition contract package.

NON-COMPETE AGREEMENTS OF THE SELLING SHAREHOLDER(S)

Usually, the buyer will not want the selling shareholder(s) to engage in competition with the Target Company, whether for their own account or for a third party. A non-competition clause is then needed. It may be in the main acquisition agreement or in a separate contract. If one or more of the selling shareholders will render services to the Target Company or the buyer company after the acquisition (see preceding section), such the non-compete clause would probably be inserted in the separate employment or consultancy contract of that person.

AGREEMENT WITH FINDER

If a so-called finder is engaged to locate a suitable Target Company, it is essential that a detailed finder's agreement be draft and signed before that party begins work. At a minimum, the finder's agreement should cover the following points:

- whether the finder will have "exclusivity" and if yes, what that means;
- how to handle information or leads about prospective Target Companies which the other party (buyer or seller, which-ever engages the finder) already has;
- the finder's commission or compensation;
- when the finder earns it;
- whether the finder may mention his client's name; and
- whether the finder has any obligations to assist, or right to participate in, the negotiations.

SOME DIFFICULT POINTS TO NEGOTIATE

Listed below are just a few examples of points that may be either difficult to negotiate or may otherwise present problems in connection with a stock acquisition of a private company (though some may well also apply to other types of acquisitions).

! **Environmental Concerns:** Where the Target Company or any of its predecessors occupying the same facility are or were engaged in activities involving industrial waste, pollution or the like, the buyer will usually want the seller(s) to agree to bear all or some of the risk of
post-closing clean-up and/or capital expenditure arising from pre-closing conditions. This can be a difficult negotiating and contract drafting point.

! **Product Liability Concerns:** Where the Target Company has been, prior to the closing, selling products involving a risk of product liability claims, it will be important for the buyer to be protected in the acquisition agreement against such claims. This can be a "sticking point".

! **Existing Agreements with Target Company:** Sometimes, there will exist contracts between the seller(s) and the target company by which one renders services to the other, or one grants certain rights and/or licenses to the other. Whether these should remain in force, and for how long, etc., can be difficult points to negotiate.

! **Intercompany Loans and Debts:** When the Target Company owes money to the seller(s), the conditions under the debt is to be paid off can be a difficult point to work out.

! **Representations and Warranties:** A seller often wants to restrict and, in effect, dilute the representations and warranties it gives to the buyer, and their duration (time of survival after closing). Sometimes, the seller will not give certain of the important representations and warranties the buyer wants and deserves. Or the seller may insist on limiting them to "the knowledge of the Target Company's top management", rather than giving absolute, unqualified representations and warranties. Here again, potentially these can be thorny points to iron out.

! **Employment and Consultancy Contracts:** Often, one or more of the selling shareholders will be individuals whom the buyer wishes the Target Company (or the buyer company itself) to employ for a period of time after the acquisition. Negotiating and preparing the contract(s) can prove difficult.

! **Lending Institutions:** If the Target Company owes money to a financial institution, there may be restrictions on the sale of the Target Company's shares (or the transfer of its assets) in the loan documentation. Also, the buyer may have to negotiate new credit lines with the Target Company's bank or other financial institutions to replace or supplement those in existence; and substitute itself as guarantor in place of the seller(s). Very often, the contract documents of the lending institutions are long and complicated, and the process of negotiating and completing those new contracts are difficult and time consuming.

**CONCLUDING REMARKS**

Whenever possible, the buyer's U.S. counsel should prepare the first draft of the acquisition agreement. If you or your company, as buyer, allow the seller(s) to prepare it, then in all likelihood it will not come anywhere close to satisfying your needs and protecting you adequately. It is usually much more difficult to rework the other side's draft than to prepare the first one. In effect, if the seller(s) prepare the first draft, you, the buyer, may have to have your U.S. counsel prepare a entire new draft. That will often complicate matters, make it difficult to
work out a deal quickly, and may be more expensive. In short, to repeat, the buyer should seize
the initiative and prepare the first contract draft.

On various occasions, I have been told by my foreign client: "We have negotiated and agree
on all major points. The signing of the acquisition contract and closing will certainly take place
within two weeks from today." I then explain to my client that that is not how it is done in the
States. It takes time to prepare and negotiate the agreements, for the "due diligence" etc. etc.

There is a common English expression: "Buying a pig in a poke" It means buying something
without doing a prior thorough job of studying and examining what one is buying and under what
terms and conditions. You, the buyer, will not be happy if you buy a pig in a poke. In short, then,
do not underestimate how long it will take to complete an acquisition. U.S. counsel experienced
in such deals will be able to advise you of a reasonable timetable within which the deal probably
can be consummated. However, even experienced U.S. counsel cannot always foresee what
may arise.