1. SHARE VERSUS ASSET PURCHASE

In some jurisdictions, a share (i.e., equity) acquisition: (i) has tax advantages or disadvantages; (ii) is simpler; or (iii) means assuming greater liability and results in a buyer obtaining the full benefit of the assets and rights of the target company.

1.1 What are the major consideration(s) for a buyer choosing a share acquisition rather than an asset acquisition?

A share acquisition in France may present the following advantages, compared with an asset transaction: it may be simpler as a legal matter; it may minimize the impact on the commercial, contractual, and (to some extent) regulatory situation of the target; it might not require prior consultation of works councils; and it will generally not entail any significant transfer tax. However, a share acquisition may result in significant capital gains tax to the seller; will not generally permit the buyer to amortize the purchased assets (subject to creation of a consolidated tax group with the target) or to use the target’s assets as security for acquisition debt; and will result in the target retaining all of its known and unknown liabilities.

On the other hand, possible advantages of an asset acquisition can in many instances include: limitation of the liabilities of the target that are assumed by the buyer; use of the acquired assets as security for acquisition debt; and direct amortization of acquired assets by the buyer. Further, asset transactions permit acquiring less than the entire business of the seller. However, as compared with a share acquisition, an asset transaction generally will be somewhat more complicated; will raise more risks of commercial, contractual, and regulatory disruption; will trigger obligations to consult works councils; and can in some cases entail significant transfer taxes (if conditions for tax-free treatment are not met).

In an acquisition of less than the entire business of the seller, the transaction is commonly structured as a transfer of the relevant business to a Newco via one of the asset-acquisition mechanisms described below, followed by the sale of Newco’s shares to the buyer.

These points, which are discussed in more detail in the responses set out below in this document, are summarized in the following table:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Stock Purchase</th>
<th>Asset Acquisition</th>
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<tbody>
<tr>
<td><strong>Structure</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Complexity</td>
<td>Generally simpler</td>
<td>May be more complex</td>
</tr>
<tr>
<td>Transfer of target’s liabilities</td>
<td>Yes</td>
<td>Transfer of some liabilities can be avoided</td>
</tr>
</tbody>
</table>
1.2 What are the major differences (for example, in relation to tax considerations or the assumption of liability) in the benefits obtained or risks assumed when comparing the acquisition of the shares of a company to the acquisition of substantially all the assets and other rights of a company?

The major differences between a share acquisition and an asset acquisition, summarized below, relate to (a) structure; (b) employment-law issues; (c) taxation; and (d) commercial, contractual, and regulatory considerations.

(a) structure of the transaction

A share sale in France is generally carried out by means of a share purchase agreement, containing features typical in other countries, with the shares of the target being sold to the buyer and transferred at closing. This transfer results in
the change of control of the target, but no change in its legal personality, or consequently in its assets and liabilities (subject to change-of-control provisions which may be invoked by third parties).

Note that the mechanism by which shares are transferred depends on the form of the target. Ownership interests in the most common form of large company, a société anonyme ("SA"), as well as the increasingly widespread société par actions simplifiée ("SAS"), and a type of ownership interest in the less common société en commandite par actions ("SCA"), take the form of shares (actions), whereas ownership interests in a société à responsabilité limitée ("SARL") and certain other kinds of companies take the form of fractional interests (parts sociales). Shares (actions) are negotiable instruments, transferable by means of share transfer forms (ordres de mouvement) whereas fractional interests (parts sociales) are transferable only by written contract. (Some of the other differences between these various forms of companies are mentioned below in this response.)

In an asset transaction, two different mechanisms are generally used to acquire the business of the target, either of which may be more complicated than a share transaction:

(i) A sale of business activity (cession de fonds de commerce). Such a transaction transfers the goodwill of the transferred business and related employees, along with additional related tangible assets such as equipment, real estate—which will require additional contractual formalities before a notary (notaire)—and inventory. Transfer of ongoing contracts with third parties is subject to their approval. Procedures for carrying out a cession de fonds de commerce include a public filing and the possibility for creditors of the selling company to obtain a court order attaching the consideration for the transfer (and, in certain cases, to preempt the sale by offering a price at least 1/6 higher than the agreed price). A cession de fonds de commerce may entail significant transfer taxes (see (c) below).

(ii) An in-kind contribution to a company in exchange for its shares subject to the divisions regime (apport partiel d’actif soumis au régime des scissions), which results in automatic transfer of the assets and liabilities being contributed (transmission universelle de patrimoine), with some exceptions (contracts considered to be intuitu personae, i.e., of a personal nature, and contracts subject to change-of-control provisions that may be invoked by third parties). This mechanism may be used only when the contributed assets and liabilities constitute an autonomous branch of business. The in-kind contribution must be reviewed by one or more court-appointed independent auditors whose report includes a valuation of the assets and liabilities being contributed. The transaction must be approved by the boards and shareholders of the buyer and seller. This mechanism allows the contributing company to be discharged of the transferred liabilities, subject to possible objections from creditors. (Note that (1) a shareholding of at least 30% in the target can be transferred by means of an in-kind contribution as described above and (2) it is possible to carry out an in-kind contribution of assets to a
company in exchange for shares (*apport partiel d’actif*) without subjecting it to the divisions regime, in which case (as in a *cession de fonds de commerce*) transfer of rights and liabilities under contracts with third parties is subject to their approval.

(b) labor matters

Either a share acquisition or an asset acquisition will result in transfer of all employees and employment-related obligations of the target (or the portion of its business being sold). However, while an asset acquisition generally requires informing and consulting the works council (*comité d’entreprise*) of the target and the buyer, information/consultation procedures for a share acquisition may be somewhat less extensive. See section 9.2.

(c) taxation

(i) transfer tax

Sales of shares of non-listed companies are subject to a transfer tax at rates (as of January 1, 2006) of 1.1% of the purchase price (or value, if higher), capped at 4,000 euros (except that the tax rate is 5%, with no cap, for shares of non-listed companies whose assets consist principally of real estate assets). If the target is organized in the form of a SARL (or other company in which ownership is represented by *parts sociales* other than certain mutuals or cooperatives whose assets are not principally real estate), the sale of ownership interests is subject to transfer tax at the rate (as of January 1, 2006) of 5% on the price (or value, if higher) above a threshold per ownership interest equal to EUR 23,000 divided by the total number of such interests in the company. However, the SARL may be transformed into an SA prior to the sale, to benefit from the transfer tax regime applicable to shares.

An asset transaction structured as a sale of a business activity (as described in (a)(i) above) is subject to a transfer tax at the rate (as of January 1, 2006) of 5% of the price (or value, if higher) exceeding EUR 23,000. However, the transfer tax is a nominal amount (maximum EUR 500) when a business activity constituting one or more autonomous branches is contributed to a company in exchange for its shares, as described in (a)(ii) above provided that any cash consideration received by the contributing company does not exceed 10% of the value of the shares received.

(ii) company income tax

In the case of a share purchase, the shares of the target, if held by a French company, are treated as capital assets. Any reserves taken for losses realized after the acquisition are deductible from income of the holding company (unless the holding company and the target are part of an integrated tax group), but recaptured upon sale of the shares.

In the case of an asset transaction, the contributing company is taxable on any gains realized on contributed assets and on any net reserves associated with contributed assets and liabilities. A special tax regime is generally available (sub-
ject to meeting certain conditions), pursuant to which a contribution (of the sort described in (a)(ii) above) can be tax-free and losses attributable to the contributed business (up to the amount of the gross book value of transferred fixed assets or, if higher, the value used for the purposes of the contribution) may be transferred to the receiving company. For an asset purchase, the purchase price will be allocated among all acquired assets (including goodwill) and may be amortized under rules applicable to the given assets (although goodwill cannot be amortized).

2. STRUCTURE

In many jurisdictions there are various ways of structuring the acquisition of the shares of a company.

2.1 The Model Stock Purchase Agreement contemplates the acquisition of the shares of a target company by means of a private purchase. In your jurisdiction, are there other ways in which the acquisition of the shares could be structured (e.g., statutory merger, plan of arrangement, tender offer/takeover bid, or consolidation)? If any of these alternatives is possible in your jurisdiction, what issues affect the choice of transaction structure?

French law allows a statutory merger, with company-law and labor-law procedures and tax treatment very similar to those of an in-kind contribution subject to the divisions regime, described in section 1.2, but generally a share purchase is used for acquisitions of privately held companies.

2.2 Is it possible to obtain favorable tax treatment by allocating a portion of the purchase price paid to the seller to other aspects of the transaction, such as consideration for a covenant not to compete or consideration for the selling of shareholder’s indemnities or contingent repurchase arrangements?

The purchase price can be allocated to elements of the transaction other than shares if such elements are distinct from the shares and if a separate price for each such asset is stated in the agreements. For example, a price paid for a non-competition covenant can be amortized by the buyer over the life of the covenant.

2.3 If less than all of the shares are acquired by the buyer, are there statutory methods by which the minority shareholders can be obliged to sell their shares to the buyer (e.g., a “squeeze out”)? Does the availability of any such squeeze out or similar method depend on the acquisition structure chosen?

There is no squeeze-out merger procedure under French law for unlisted companies. For listed companies, minority shareholders can be forced out through a delisting (“going private”) procedure when the majority shareholder holds at least 95% of the shares.

2.4 Is it necessary or advisable to effect a share acquisition through an entity formed in your, or another, jurisdiction?
A typical acquisition structure in France involves creation of an acquisition holding company in France to purchase the shares of the target. If the buyer is a French entity, interest paid by it on acquisition financing will be deductible (subject to limitations on deductibility of interest paid to direct shareholders of the buyer). If a consolidated tax group is created in France which includes the target and the buyer, such interest can be set off against income of the target. In some situations, it may be useful to establish a French branch of a foreign company, which can purchase the target (and form a consolidated tax group in France with the target).

2.5 In certain jurisdictions, there are laws that prohibit or restrict a company from providing financial assistance for the purchase of its own shares. If the buyer is borrowing money to finance the purchase of the target company, this might, for example, prohibit the target company from agreeing to having its assets used to secure the loan. Are there similar laws in your country? If so, please describe briefly what forms of financial assistance are prohibited or restricted. Would the laws in your jurisdiction, for example, prevent a target company from repaying its debts early, in contemplation of an acquisition of its shares, pledging its assets, giving guarantees, indemnities, representations, or warranties, or paying transaction costs in connection with the acquisition of its shares?

If there are such laws, are there any applicable exemptions? If so, do these apply to all companies? Please briefly describe any exemption procedure.

Under French law, a stock corporation (société anonyme, société par actions simplifiée or société en commandite par actions) is prohibited from providing money, loans, or guarantees (including pledges of assets) for the purchase or subscription of its own shares by a third party, with a few exceptions (current operations by credit institutions and purchases for employees of the company or of certain related companies); this is an absolute prohibition and cannot be avoided by such steps as approval by the target’s board of directors. Although not stated in the law or definitively resolved by jurisprudence, it appears that the prohibition applies to (a) assistance by the target for the indirect purchase of its own shares (such as assistance for the purchase of a holding company that controls the target) and (b) contractual commitments by the target (such as representations and warranties) in support of an acquisition of its shares, but does not apply to (c) companies such as an SARL with ownership interests represented by parts sociales, (d) steps taken after the acquisition, if clearly not agreed prior thereto, (e) payment of dividends by the target that have the effect of contributing to the financing of the acquisition or (f) early repayment by the target of its debts if this can be justified as being in the target’s interest.

In addition, French law prohibits, as an abusive use of company assets (abus de bien sociaux), certain transactions involving use of assets or credit of a company for purposes not in the company’s interest and that involve the company’s managers or companies in which they have a direct or indirect interest. When
companies form part of a group that has a genuine common strategy, the general interest of the group may be taken into account, but there must be a “balance” in the advantages and disadvantages for the companies involved and the commitment of each company cannot exceed its financial capabilities. The prohibition of abusive use of company assets generally has the effect of prohibiting a French company from participating in a group financing arrangement unless the company itself benefits from that arrangement.

2.6 What are the timing constraints on a share acquisition resulting from the laws of your jurisdiction?

Aside from transaction-specific timing factors, timing constraints may typically result from the obligation of the target’s management to inform and/or consult with the works council (see section 1.2(b)), the need to obtain regulatory or other approvals (see section 5), and merger clearance procedures (see section 6).

3. TAXATION

3.1 Could the form of the documentation make any difference to the tax effects of a transfer of shares in your jurisdiction?

As mentioned above, transfer tax is payable on an agreement to sell shares but is limited to EUR 4,000.

3.2 Does your jurisdiction require tax to be paid or withheld on transfers of shares? Are there indirect taxes imposed on a purchase of shares (e.g., sales taxes, value-added taxes, or stamp duties)? Is a buyer of shares required to withhold part of the purchase price to cover the tax liabilities of the seller arising from the sales transaction?

Transfer taxes are payable as described in section 1.2(c). Transfer tax is generally collected from the buyer, although both seller and buyer are jointly liable for the tax. There is no withholding for either capital gains or transfer taxes.

3.3 Is there any way for the buyer in a share acquisition to treat the transaction, for tax purposes, as though it were an asset transaction, and what would be the consequences? Is there any way to deduct or amortize the purchase price through increased depreciation of the target company’s assets or other means of amortization?

It is not possible to treat a share acquisition as if it were an asset acquisition. See section 1.2.

3.4 Is it possible to do a tax-free exchange of shares or to structure the acquisition of shares, or the consideration to be paid or exchanged, in some manner so as to allow the selling shareholder to defer immediate recognition of taxable income? Could the seller’s use of any of these techniques disadvantage the buyer and, if so, what is an acceptable compromise position?
Transfer of shares (by sale or in-kind contribution) results in the immediate taxation of any capital gains realized by the seller. However, the seller can defer (but not avoid) recognition and taxation of capital gain if the shares are transferred by in-kind contribution subject to the special regime described in section 1.2(c)(ii), which requires meeting certain conditions (including holding for three years the shares received in exchange for the contribution).

3.5 Is it possible to obtain a tax ruling in connection with a proposed tax structure prior to completing the acquisition? Is it common to obtain such a ruling? If so, are such rulings binding and how long does it normally take to obtain one?

A ruling is not possible, although tax authorities may render opinions on specific aspects of the proposed transaction.

3.6 Are there other significant tax issues in your jurisdiction that must be considered in a share acquisition?

Other issues may arise depending on the tax situations of the parties.

4. DOCUMENTATION

In some jurisdictions: (i) a share acquisition requires specific documentation in a prescribed form; and/or (ii) it is customary to enter into other agreements, such as letters of intent, prior to signing the share acquisition agreement.

4.1 Could the Model Stock Purchase Agreement be used, generally and in its present form, including its extensive representations, warranties, indemnities, and remedies? Do the laws, customs, or practices of your country dictate a specific or different form of agreement or other such formalities as notarizing the agreement or having the agreement drafted in a prescribed language?

The Model Stock Purchase Agreement could be used for the purchase of shares of a French company, subject to review of specific terms.

Traditionally, French acquisition agreements were typically less detailed than the Model Stock Purchase Agreement, since parties to a share transaction relied to some extent on statutory warranties (including the warranty of good title and the warranty against hidden defects) and the general obligation to act in good faith (which includes an obligation to disclose). However, longer and more detailed US- and English-style documents are increasingly accepted as the norm in France. Nevertheless, most acquisition agreements in France are somewhat more concise than such agreements in the United States.

4.2 What form of document is used to transfer shares? Are there any other formalities required for the transfer of the shares? Are there registration, filing, or publication requirements in connection with the documentation used in a share acquisition?
Transfer of shares is accomplished by a share transfer form (*ordre de mouvement*). Shares are not represented by certificates. Share ownership is represented by entries on a share registry and shareholders accounts. The share transfer must be registered with tax authorities for purposes of payment of transfer taxes, described above.

4.3 **Is it common to enter into agreements prior to the signing of the definitive share purchase agreement, such as a letter of intent (sometimes also called a memorandum of understanding or heads of agreement), a confidentiality agreement, a lock-up arrangement, or a break-up fee agreement?** If it is common to enter into a letter of intent: (i) what are the principal considerations involved in deciding whether to do so; and (ii) is it possible to make only certain provisions of the letter of intent legally binding? Is there an obligation to negotiate in good faith in connection with the matters set out in the non-legally binding provisions of the letter of intent?

It is common to enter into letters of intent and/or binding confidentiality agreements prior to signing the final acquisition agreement. Principal reasons to enter into such a preliminary agreement include setting the stage for due diligence and any further negotiations; avoiding any claim of negotiating in bad faith (which can lead to tort liability); and defining confidentiality obligations. Such an agreement can include features such as exclusivity agreements and break-up fees. It is possible to make only certain provisions of the letter of intent binding, and this should be expressly stated in the letter of intent itself. However, with respect to matters not covered by binding agreement in a letter of intent, since French law requires that the parties negotiate in good faith, the buyer could become liable for breaking off negotiations for reasons inconsistent with the reasonable expectations of the seller (taking into account the non-binding provisions of the letter of intent).

4.4 **Is it common for the target company to be a party to the share acquisition agreement? If so, for what purpose?**

Although in most cases the target is not a party to the share acquisition agreement, this is sometimes done for such purposes as giving it the benefit of indemnification rights in case of breach of representations or warranties. However, even if the target is not a party to the agreement, it can become a third-party beneficiary of the agreement, if this is made clear therein.

4.5 **Is it common for the shareholders of a company to enter into agreements regulating the relationships among themselves or with the company?**

Yes, it is usual for all or some of the shareholders of a company to enter into agreements regulating the relationships among themselves or with the company. Among the issues often covered in such agreements are the composition of the board, policy to be followed in managing the company (for example, with respect to distribution of dividends), restrictions on sale of shares and possible
preemption rights, dispute-resolution mechanisms (including buy-sell arrangements), and noncompetition and confidentiality obligations.

5. APPROvals/COMPLIANCE

In some jurisdictions, the sale or acquisition of shares requires: (i) government approval regarding foreign investments; (ii) other governmental approvals; (iii) the approval of a specific body within or related to the seller (e.g., the board of directors or the shareholders of the seller’s ultimate parent company); (iv) administrative filings prior to the acquisition; or (v) compliance with securities laws (i.e., laws governing the issue or transfer of shares).

5.1 Are there business activities that are subject to special regulations that would prevent a non-national from engaging in such activities or require special approvals? If so, please describe the general categories of business activities that are subject to such special requirements. Can conditions be attached to any approvals?

No governmental approval is generally required for foreign investments. However, prior authorization from the French Minister of Economy and Finance (“MINEFI”) is required for foreign investments in the following economic areas: gambling businesses; certain private security activities; certain activities relating to combating terrorists’ use of biological or chemical substances; wire-tapping or mail interception equipment; certain activities relating to information systems and dual-use items; cryptology; classified information; armaments and explosives; and defense. When the investor is from an EU member state (or an EEA country that has signed an administrative cooperation agreement with France), the criteria governing when prior approval is required are somewhat narrower than for other investors. If the authorization is not granted or refused within two months, it is deemed to be granted. Conditions can be imposed for grant of such authorizations.

Whether or not prior approval is required, generally acquisition of control of a French company (considered to include holding a percentage of share capital or voting rights exceeding 33.33% for non-listed companies or 20% for listed companies, or control by other means such as contract rights, loans, or guarantees) must be declared to the MINEFI at the time of consummation of the acquisition. However, there are various exceptions to this declaration requirement, including for investments in real-estate companies (other than real-estate development companies) and investments of less than EUR 1,500,000 in manual-craft businesses, retail stores, hotels, restaurants, loan services, or quarries.

In addition, acquisitions in excess of EUR 15 million and certain other transactions must be notified after the fact to the Bank of France.

5.2 Are there restrictions or requirements on the nationality or other qualifications of shareholders, directors, or officers of a company? Is there a requirement that directors own shares in the company?
Pursuant to article 7 of Law No. 86-897 of August 1, 1986, non-French citizens, companies (i.e., those in which foreigners have majority shareholdings) and associations (i.e., those in which a majority of members are non-French) are prohibited from acquiring more than 20% of the shares of voting rights of a company publishing French-language texts. This prohibition does not apply to creating new companies. Also, the prohibition is subject to treaties entered into by France, so that it does not apply to nationals of EU countries or certain other countries (but the prohibition does apply to U.S. nationals). We are aware of no jurisprudence dealing with indirect acquisitions of a greater-than-20% interest in companies covered by this law.

In some sectors, such as banking, insurance, real estate, and pharmaceuticals, at least some of the managers must have specific professional qualifications.

Work and residence permits are required for non-EU employees resident in France from non-EU countries (and from the 10 new EU member states, at least through the end of 2006). Nationals from EU member states (except the 10 new members) do not need a work permit and for them to obtain a residence permit is a simple formality.

A member of the board of directors is required to own (or possess, by means of a loan) at least one share of the company (or a greater number as required by the by-laws).

Individuals who are not nationals of EEE or OECD countries require an authorization from French authorities to serve as president of SAS or SA or Director General of an SA.

5.3 Apart from the approvals concerning non-nationals (mentioned above) and any antitrust approvals (see section 6 below), are there any other governmental or other approvals required in relation to the acquisition? If so, can any conditions be attached to such approvals? Please also provide details on the likely time to obtain such approvals. Would the information supplied by the parties to the relevant authorities in obtaining such approvals be kept confidential?

Approvals are required for acquisitions in a number of industries. The following is a non-exhaustive list:

- **Insurance.** Prior notification must be given to MINEFI of any acquisition or disposition of control of an insurer licensed in France (or the controlling shareholder thereof), or exceeding or falling below the thresholds of 50%, 33 1/3%, 20%, or 10% of voting rights of such an insurer (or controlling shareholder), which can block the transaction by decision taken within three months of receipt of a complete notification. In addition, prior notice must be given of any acquisition or disposal of 5% of voting rights of a French licensed insurer. (See Insurance Code, article R.322-11-1.)

- **Credit institutions and investment companies.** Acquisition or disposition of control, or of 33 1/3%, 20%, or 10% of voting rights, of credit institutions or investment companies must receive prior approval of the Comité de établissements de crédit et des entreprises d’investissement ("CECT"); tacit approval is deemed given if no decision is taken within three months of request therefor (see Règlement
CRBF n° 96-16 of December 20, 1996; see Monetary and Financial Code, arts. L.511-10 and L.511-14). Similar procedures apply to acquisition of control of companies in the securities business (see Monetary and Financial Code arts. L.532-3-1).

- **Pharmaceutical and medical device businesses.** Prior authorization of the Ministry of Health (Agence française de sécurité sanitaire des produits de santé) is required for any change in control of companies involved in these businesses. A decision is to be made within 30 days of receipt of an application, unless an on-site inspection is deemed necessary in which case the decision can be deferred for up to an additional 90 days. If no decision is rendered within the applicable time period, the request is deemed to be refused if the business concerned is involved in manufacture, import or distribution of the relevant products, with certain exceptions. See articles R.5110 and R.5111-1 of the Code de la Santé Publique.

Confidential treatment can generally be requested for sensitive information. Although not required by law, it is common for the by-laws of non-listed companies to require board approval of new shareholders.

5.4 **In some jurisdictions, a change of control of a company can be subject to third-party consents or give rise to third-party rights, e.g., lenders, landlords, and other co-contractants. Are such change-of-control considerations relevant in your jurisdiction?**

Other than as described above, there are no change-of-control provisions in French law of general application of the sort described in the question. However, preemption clauses or other relevant provisions relating to sale of shares may be contained in shareholders agreements or the target’s by-laws. In addition, contracts with third parties may include change-of-control provisions.

5.5 **Is there any information that a buyer may be required to furnish to the holders of the shares being acquired, whether about itself or otherwise? Is it ever necessary to have the contents of such documents approved by a third party?**

There are no generally applicable requirements for the buyer to provide information about itself if the target’s shares are not publicly traded, except as may arise from the buyer’s general obligation to negotiate in good faith.

For publicly held companies, public filings (and notification to the company) must be made after shareholding reaches (or falls below) the following thresholds: 5%, 10%, 20%, 33 1/3% (reaching this threshold triggers a tender obligation), 50%, and 66 2/3%.

5.6 **Can the purchase of shares of a private company in your jurisdiction raise securities law issues where the purchase price is paid in cash, e.g., by reason of the number of selling shareholders or the manner in which the shares are being acquired? Would the answer be different if the purchase price were paid wholly or partly in shares? If so, please describe briefly these dif-
ferences. If there are any such securities law issues, please briefly describe them and mention any likely delay periods.

Cash acquisitions of a privately held company do not generally raise securities-law issues, but if the acquisition is made wholly or partly by exchange of shares, French securities law will apply. A sale or the distribution of securities (or other financial instruments) in France that includes use of publicity, solicitation, or a financial intermediary is considered a public offering of securities unless falling with the private placement exemption, which covers issuance or sale of securities (or other financial instruments) to investors acting for their own account and consisting of (a) qualified investors or (b) a “restricted sphere” of French investors having personal, professional, or family ties with the issuer’s management (these ties are presumed if there are fewer than 100 such investors).

5.7 Can the purchase of shares of a privately held company in your jurisdiction bring about the application of corporate take-over bid legislation or other corporate legislation relating to the change of control of a company?

Purchase of shares of a privately held company does not cause application of takeover bid rules. There is no general corporate legislation relating to change of control (although the labor-law procedures described in section 9 will apply).

If the buyer’s shares are publicly listed, in case of a tender offer (which becomes mandatory when the holdings of the buyer and all parties with which it is acting in concert reach the threshold of one-third of the shares or the voting rights in the target), the offer documentation must contain information about the bidder, its offer, its goals in respect of the target and intended employment policy. The offer documentation must be submitted for approval to the Financial Markets Authority (Autorité des Marchés Financiers or “AMF”). In addition, the buyer making a tender offer must provide the offer documentation to, and meet with, the target’s works council; the buyer cannot vote shares of the target until it meets with the works council.

6. COMPETITION/ANTITRUST

In many jurisdictions, antitrust laws require, where the acquisition and/or the parties to it are of a certain size, that the transaction must be notified to and/or approved by a governmental or other authority.

6.1 Are there any similar requirements in your jurisdiction? If so, please briefly describe them. Please include details of any relevant thresholds beyond which these requirements may apply.

Share acquisitions are subject to French merger clearance procedures, as described below in this section 6, when (a) they involve acquisition of control by one company or group of another (or merger or certain joint ventures), and (b) in the fiscal year preceding the transaction (1) the parties involved (including all affiliated companies) had a combined worldwide consolidated turnover of more than EUR 150 million and (2) at least two of the parties (including all affiliated
companies) had a turnover in France of more than EUR 50 million. In calculating the seller’s turnover, only the turnover of the target (and its subsidiaries) is relevant, unless the seller will retain a co-controlling influence in the target.

Acquisitions (and other concentration operations) of EU companies are subject to EU merger control rules when they have a Community dimension, i.e., when they meet either of the following two sets of criteria:

(1) very large mergers:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State;

(2) other large mergers:
- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million;
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

6.2 If filings or notifications are mandatory, what information must be disclosed? Are such filings and notifications kept confidential?

French merger control procedures require that a filing be made with the MINEFI for any transaction meeting the thresholds set out in section 6.1. Information to be disclosed includes the following:

1. Description of the proposed transaction, including the acquisition agreement and a presentation of the legal and financial aspects of the operation and its economical objectives.

2. The presentation of the companies involved and their affiliates, including financial statements and three-year financial data, directors and principal shareholders, shareholders agreements, annual accounts for the last fiscal year with details on the turnover realized in France, contracts among companies concerned by the merger, and a list of the concentration operations realized within the last three years.

3. A definition of the market(s) of products or services concerned by the proposed transaction, explaining the criteria selected to identify the products or services that the notifying parties consider to be equivalent.
4. Information concerning “affected markets,” which will include those in which the companies involved in the proposed transaction collectively have at least 25% market share and in markets in which those companies participate which are upstream or downstream of markets in which they collectively have a market share of at least 25%. For each such market, detailed information is to be provided, including economic information, market share, identity of principal clients and suppliers, agreements related to those markets among the companies involved in the proposed transaction, and other pricing and economic information.

The parties may request confidential treatment of certain information in the filing.

6.3 Can approvals be granted subject to certain conditions (e.g., requiring the buyer to divest itself of part of its existing business or the acquired business within a certain time after completion of the acquisition, or requiring the buyer to grant licenses to third parties)?

Yes, approval can be made subject to conditions such as divestiture or licensing of third parties.

6.4 Apart from any mandatory filings or notifications, are there any other filings, notifications, or other steps that might nonetheless be advisable or other considerations that should be addressed, for example, because the antitrust legislation could still apply? Are any such filings and notifications kept confidential?

Generally, there are no other mandatory filings, notifications, or other steps of the sort described above, although specific steps may be advisable depending on the circumstances of a particular transaction.

6.5 How do all of the above matters affect the likely timetable of a share acquisition?

French merger control procedure includes initial examination of the transaction by the MINEFI, which may take up to five weeks, and possible referral to the Competition Council (Conseil de la Concurrence) for an opinion and ultimate decision by the MINEFI, all of which may take several months. The applicable schedule is as follows:

- Notification is made at an advanced state of negotiations on the acquisition or after binding agreement has been reached on the acquisition (subject to the condition precedent of merger control approval). Closing cannot occur until MINEFI approval is received (except in exceptional cases where the MINEFI permits closing of all or part of the transaction, subject to condition subsequent of final approval of the operation or relevant part thereof).
- The MINEFI renders a decision within five weeks of receipt of a complete notification (or, if later, three weeks after the parties make commitments to lessen the anti-competitive effects of the transaction). The MINEFI decision may either approve the transactions; find it to be excluded from the scope
of merger-control procedures; or refer it to the Competition Council (Conseil de la Concurrence).

- The Competition Council, after fact-finding and one or more hearings, renders its decision within three months.
- After the Competition Council has made a ruling, the MINEFI renders a decision within four weeks.

6.6 Are there any post-closing filing obligations?

Post-closing obligations may be imposed by the MINEFI.

6.7 Are there overriding competition/antitrust considerations in your jurisdiction, even in circumstances where the size of the transaction and the parties to it do not trigger notification or filing obligations?

Even when merger-clearance procedures do not apply, French and EU rules relating to trade restraints and abuse of dominant position will apply.

7. ASSETS AND LIABILITIES

In most jurisdictions, upon the transfer of shares of a company, most, but not necessarily all, of the assets, rights, and liabilities of the company will remain with the company following the transfer.

7.1 In your jurisdiction, are there any rights or assets that might not continue to benefit the company after the transfer of shares? For example, might prior years’ tax losses or other tax incentives or advantages or contractual rights, permits, or licenses be lost? Could a sale of shares result in a revaluation of assets for taxation purposes?

Permits, licenses, and contracts may be subject to change-of-control provisions and could be lost as a result of an acquisition.

Normally, the tax situation of the target will not change as a result of an acquisition (if its activity is not changed); however, if it was part of the seller’s consolidated tax group, there may be consequences for that group, and there may be tax consequences in relation to certain past tax-free or tax-deferred transactions.

7.2 Does the target company retain all its liabilities following a share acquisition in your jurisdiction? Are there liabilities of the target company that may be reduced or eliminated as a result of the acquisition?

Generally, liabilities of the target are not affected by an acquisition except as may be provided (for example, with respect to acceleration of debts) by change-of-control or similar clauses.

7.3 In what circumstances, if any, might the buyer become liable for the acts, omissions, or liabilities of the target company? How can this risk be reduced or eliminated?
Generally, shareholders of a French limited liability company (SA, SAS, or SARL) are not liable for the acts, omissions, or liabilities of the company, except to the extent of any unpaid capital contributions. Exceptions to this general rule are described in section 7.4.

7.4 In what circumstances, if any, might the shareholders, directors, or officers of a company be liable to one another or third parties for the acts, omissions, or liabilities of the target company? How can this risk be reduced or eliminated?

In addition to possible liability of the shareholders for any unpaid share capital, in certain circumstances shareholders or managers of a company may become liable for its debts in the following situations: (1) If the company enters bankruptcy proceedings, any de jure or de facto manager of the company (for this purpose, de jure managers include the chairman of the board (président), director general, and board member and de facto managers include anyone exercising control thereof) may be held liable for any insufficiency of assets that is caused by management errors. (2) A shareholder (or any party) that maintains a company in operation (for example, by cash contributions or forbearance from collecting debts), in circumstances where the company is not economically viable, may be held liable to creditors who did business with the company during this period or shareholders whose equity was thereby diminished. (3) Certain transactions entered into with the target (or the seller) may be held void (and rescinded) if the target (or the seller) was insolvent at the time of the transaction; the date of insolvency can be set up to 18 months prior to the date of commencement of bankruptcy proceedings. (4) Certain transactions with related parties are subject to prior board approval or ratification by the shareholders; in the absence of such approval or ratification, interested parties may become liable for any damages suffered by the company. (5) Managers and related companies involved in transactions characterized as “abusive use of company assets” (see section 2.5) may have civil and penal liability as a result of such transactions (including liability resulting from bankruptcy of the company). (6) More generally, managers of the company have a duty to act in its interest and may be liable for breach of this duty.

These risks can be reduced by careful analysis of the relevant transactions and, to some extent, by D&O insurance and by indemnification agreements with third parties.

7.5 Under what circumstances after closing, if any, might the seller or its directors or management continue to be liable for the pre-closing acts or omissions or liabilities of the target company? Is it customary to give indemnities against this exposure?

The seller or former directors or managers of the target may remain liable to the target for actions taken prior to closing that breach their duties to the target.

7.6 In some jurisdictions there are restrictions or limitations on the rights of parties to a contract (particularly distribution or agency agreements) to
terminate existing relationships. Would the target company, following the purchase of its shares, be subject to such restrictions or limitations in your jurisdiction?

Any termination by the target, after purchase of its shares, of an existing contract would be subject to normal legal rules relating to such terminations (for example, in the case of distribution arrangements, the terminating party may be subject to damages unless reasonable notice is given).

8. DUE DILIGENCE, PUBLIC RECORDS, CONFIDENTIAL INFORMATION

A potential buyer is likely to require detailed information from the seller about the target company and, in some cases, the seller. In certain jurisdictions, courts, chambers of commerce, central registries, or other organizations can provide a potential buyer with information about the seller, the target company, and/or its assets.

8.1 In your jurisdiction, is it customary or advisable prior to the acquisition of shares for a buyer to conduct:

(i) legal due diligence;
(ii) financial and accounting due diligence;
(iii) environmental audits; or
(iv) other specific due diligence investigations?

If so, what is the customary scope of the investigations and does the buyer typically provide the seller with a due diligence questionnaire covering the matters to be investigated? (Please do not provide a precedent questionnaire with your answer.)

It is both customary and advisable to conduct legal, financial/accounting, environmental, and tax due diligence. The customary scope of such investigations may be quite broad. It is typical for the buyer to provide the seller with a due diligence questionnaire covering the matters to be investigated.

8.2 Are there public records in your country that disclose the existence of (and, where applicable, provide copies of relevant documents) or provide information about:

(i) the constituting documents of the company;
(ii) the different classes of shares of the company;
(iii) the rights attaching to the shares;
(iv) the amount paid up on the issued shares;
(v) the identity and percentage ownership interests of the shareholders;
(vi) the directors and officers of the company;
(vii) the “good standing” of the company;
(viii) the statement of accounts (are these accounts audited?) or other financial information relating to the company;
(ix) the solvency of the company;
(x) any agreements between shareholders relating to the company; and
(xi) security interests, liens, or other encumbrances or charges affecting the shares?

To what extent can the accuracy of these records be relied upon? Are there requirements for any other information to be filed on a public record with respect to a company?

Basic information about the company is available from the registry of commerce and companies. A summary of key information is contained in an extrait K-bis, which lists the official headquarters, share capital, the company’s principal activity, the identity of managers entitled to act for the company, members of the board of directors, statutory auditors, financial year, addresses of branch offices, the existence of insolvency proceedings, and certain operations in which the company has been involved (such as mergers). Also available are a statement of some possible liens (including tax liens and liens on the going business) and a copy of the by-laws (which are the constituting documents of the company and include information regarding corporate purpose, share capital, classes of shares and rights attaching thereto, possible limitations on transferability of shares, and other matters).

Information regarding whether shares are paid up, the identity and percentage ownership of shareholders and shareholders agreements are not available from the commercial registry (except in the case of a société en nom collectif or “SNC,” which is similar to a general partnership, whose shareholders are shown on the extrait K-bis, and an SARL or certain other forms of companies, whose by-laws must state the identity and percentage ownership of shareholders).

Accounts (audited and as approved by the annual shareholders meeting) are supposed to be filed yearly but are often not up to date or not complete. (There is no concept of “good standing” of a French company.)

8.3 Are there public records in your country that disclose the existence of (and, where applicable, provide copies of relevant documents), or provide information about, the assets or matters affecting the assets of a company, including, in particular:

(i) security interests, liens, or other encumbrances or charges (whether contractual in nature or arising by operation of law by reason of non-payment of taxes or otherwise);
(ii) the ownership of intellectual property;
(iii) the ownership of real (immovable) property;
(iv) pending litigation; or
(v) environmental issues?

Is it possible to obtain certifications from public authorities confirming the payment of taxes and other matters by the target company? To what extent can the accuracy of these records and certificates be relied upon?

Some recorded security interests are available from the registry of commerce and companies, as mentioned above. Trademark and patent information are
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available at the Institut National de la Propriété Industrielle (INPI), and information regarding ownership and mortgages of real property is also available from the public mortgage registry (conservation des hypothèques). There is no national public register for pending litigation, although the clerks’ offices of individual courts may be consulted in this respect. Some information as to environmental issues is publicly available. No general “clearance” certificate as to payment of taxes can be obtained. It is not general practice to obtain certificates from public authorities as to compliance with other requirements.

8.4 Assuming there is no express agreement between the parties controlling or restricting the use of confidential information disclosed in connection with a sale of shares, are there any restrictions on the use or disclosure of such information? Are there any antitrust (competition) issues relating to the sharing of information prior to the completion of a share purchase, such as information on price or cost of sales, market shares, customer lists, customer proposals, or distribution agreements?

In the absence of a confidentiality agreement, managers of a French company have a duty of loyalty to the company, which must be taken into account when considering disclosure of confidential information. Shareholders generally have no such obligation, absent specific agreement. Disclosure of information on customers or other third parties may be restricted due to confidentiality obligations of financial institutions or insurers and restrictions on transfers outside the EEA of personal data on individuals.

Any communication among competitors must be handled with care to avoid the risk that it might be considered to be violating competition rules.

9. LABOR MATTERS

In your jurisdiction:

9.1 What is the effect of the acquisition on the employment relationship between the target company and its employees and officers? Will these employment relationships automatically continue?

The acquisition generally does not affect the employment relationship between the target and its employees and officers. All employees and officers are generally protected against unfair dismissal by law and contract rights. However, the chairman of the board (président) of a société anonyme must by law be subject to dismissal at will, and any indemnification obligations to him by the company may be void (although such indemnification obligations from affiliates may be valid). A director general is also subject to dismissal at will but can receive damages for dismissal without valid cause. (A director who is also a salaried employee can be dismissed from the salaried position only via the dismissal procedures described in section 9.3.)

9.2 Will a share sale be subject to consultation with, or authorization from, any works council, labor union, or other body?
As mentioned in section 1.2(b), in case of a share sale the management of the target must inform and consult its works council (and if the buyer is a French company with a works council, it must be informed and consulted).

Any French company with at least 50 employees must have such a works council. The council is chaired by the chief executive of the employer or another employer representative; representatives of the works council can attend the shareholders meeting (and meetings of the board of directors or supervisory board). The works council must be informed and/or consulted by management in connection with a variety of matters (including those relating to “the organization, management and general operations” or “modifications in the economic or legal organization” of the company, such as merger, sale, or important modification of the company structure or acquisition or sale of subsidiaries).

An obligation to inform the works council requires simply that notice be given, whereas an obligation to consult requires that the works council first be informed and then be given a reasonable time to ask additional questions and express a view on the matter, which management is not required to follow. (Note that special consultation procedures apply in case of tender offers, see section 5.5, and plans to reduce staff, see section 9.3.) If there is an obligation to consult with regard to a planned transaction, a final decision to carry out the transaction must not be made until the consultation is completed.

When management of the target becomes aware of a change in its shareholding, which occurs in the case of a share acquisition, there is an obligation to inform and consult the works council. If the buyer is a French company with a works council, that works council must be informed and consulted prior to acquisition of shares in the target.

On the other hand, an asset acquisition generally triggers an obligation to inform and consult the works council, which requires informing it in an initial meeting, answering questions it may raise and then at least one additional meeting at which the works council expresses its view. This process may take several weeks or more.

9.3 After the consummation of the acquisition, can the target company unilaterally change the terms of employment of its employees? Does your jurisdiction impose an obligation to make severance payments to terminated employees?

It is generally not possible to make unilateral changes in the terms of employment. Many matters, such as the duration of the work week, overtime rates, and health and safety issues, are set by law, regulation, or collective agreement (convention collective). Other matters are determined by individual contract. Any significant change in remuneration or other terms or conditions of employment can be refused by the employee and if implemented are a cause of constructive dismissal.

Termination of employment generally is subject to significant restrictions. Moreover, the works council must be consulted prior to adoption of any measures involving “restructuring and reduction of employment.” Once dismissals
are notified, they can be challenged in court on procedural or substantive grounds, and if defective can be ruled void or result in damages. In addition, the employer can be subject to penal sanctions for failure to comply with certain of the rules. In the case of collective dismissals, special procedures apply. Such measures may also raise significant political and public-relations issues.

The basic obligations of the employer in the context of dismissals for economic reasons, and the procedures applicable to collective dismissals, are described below (subject to any rules more favorable to the employees found in collective agreements and to special protective rules applicable to certain categories of employment, such as employee representatives, pregnant women, and employees having suffered employment-related injuries).

(a) Basic obligations of the employer in the context of any dismissal for economic reasons

In connection with dismissals for economic reasons, the employer has six basic obligations:

(1) Justify the dismissal for “legitimate cause.” Under French law, any dismissal of an employee requires legitimate cause (cause réelle et sérieuse), which may arise either for personal reasons relating to the individual employee (such as fault or incapacity) or for economic reasons. Dismissal for economic reasons is considered to be legitimate cause when based on factors such as “economic difficulties or technological evolutions.” Such grounds must be serious and must be capable of detailed justification. Legitimate cause may be found when the contemplated measures are necessary to “preserving the competitiveness” of the company or division concerned; this generally requires that the viability of the company or division be under threat, and not simply that the proposed dismissals are designed to improve profits. In case of dismissals without legitimate cause, the employer is subject to damages (over and above the payments described in (4) below), which at a minimum under the law must amount to at least six months’ salary and often exceed that amount. The employer may alternatively be ordered to reinstate the dismissed employee.

(2) Choose employees for dismissal based on objective criteria. These criteria should take into account such factors as family situation, seniority, etc.

(3) Attempt to redeploy the employees whose positions are abolished. Efforts to redeploy employees must attempt to identify appropriate positions (including those for which the employee would be suited after retraining) throughout the group of companies (including non-French companies) of which the employer is a part.

(4) Make payments and provide other benefits to the dismissed employees. In any termination for legitimate cause, except termination of an individual employee for serious fault, the employee is entitled to a prior-notice period (generally two or three months) and, upon the cessation of employment, payments for (i) any paid vacation earned but not yet taken, (ii) severance indemnities, which vary depending upon the seniority and classification of the employee,
and (iii) payments in certain cases in respect of contractual noncompetition clauses, if any. The amount of all these payments is determined under the individual employment contract and the applicable collective agreement, subject to a minimum set by law. The severance indemnity is generally based on a percentage of the employee's monthly compensation, multiplied by the number of years the employee has worked at the company.

(5) **Consult with the works council.** Prior to dismissal for economic reasons, the works council and administrative authorities must be informed and must be consulted.

(6) **Rehiring priority.** The employer must give the employee, upon request, for one year after dismissal, priority for rehiring in any appropriate positions that become available in the employer’s group of companies.

(b) Procedures applicable to collective dismissals

The required procedures for collective dismissals (10 or more employees within a 30-day period) in companies with at least 50 employees involve parallel consultations with the works council and with administrative authorities as described below. These procedures can be varied by certain agreements with unions. (For smaller companies there are similar procedures for consultations with personnel delegates and administrative authorities.)

The employer is required to establish a plan to safeguard employment (*plan de sauvegarde de l’emploi*), consisting of measures designed “to avoid dismissal or limit the number thereof and to facilitate the replacement of personnel whose dismissal cannot be avoided, in particular older employees or those whose social characteristics or qualifications make their reentry on the job market particularly difficult” (art. L.321-4-1 of the Code du travail). The plan must include such measures as employer-assisted programs for outplacement, professional education/retraining and early retirement, assistance for creation of new businesses by dismissed employees, and reorganization of the employer’s operation (such as reductions of working hours) to limit the number of dismissals. The plan must be submitted for consultation to the works council, which can retain at the employer’s expense an accountant who will have access to all relevant documents of the employer. The plan must also be submitted to French administrative authorities, which verify that the plan complies with procedural and substantive requirements and is empowered to “suggest” modifications or additions to the plan.

The consultation with works council in case of collective dismissals takes place in two meetings (or three, if an accountant is retained), pursuant to a schedule which varies depending on the number of proposed dismissals.

9.4 **What steps should a buyer take in dealing with unfunded pension liabilities of the target company?**

Generally, French companies do not have significant unfunded pension liabilities (since the principal pension schemes for private-sector employees are covered by State-run entities). However, companies with more than 50 employees
must establish a compulsory profit-sharing plan (*participation aux résultats de l’entreprise*), generally applicable when net profits exceed 5% of equity, and in addition many companies participate in optional investment plans (*plan d’épargne d’entreprise*), optional profit-sharing plans (*intéressement*) and stock-option plans. The extent to which the target has obligations relating to any of foregoing should be the subject of careful due diligence.

9.5 In some jurisdictions, legislation restricts the ability of employers to engage in “plant closings” or “mass layoffs” without providing notice of the intended action to various individuals and agencies. There are often severe penalties for failure to comply with these requirements. Are there any similar restrictions in your jurisdiction?

See answer to 9.3.

10. NONCOMPETITION UNDERTAKINGS

In certain jurisdictions, noncompetition clauses cannot be enforced against the seller of shares because they violate public policy or competition laws, or can only be enforced with certain limitations as to time, scope of covered activities, or geographic area.

10.1 In your jurisdiction, can a noncompetition clause be enforced against: (i) the seller;

A noncompetition clause can be enforced against the seller, provided that, if the seller is an individual, the clause must be reasonable in respect of its duration, subject matter, and geographical scope and cannot have the effect of depriving the seller of the ability to earn a living (except to the extent that consideration is allocated to the clause).

or (ii) the target company’s employees (including employees whose employment is terminated)?

Generally, during their employment by a company employees may not compete with that company; it is not uncommon, however, to strengthen this general principle with contractual clauses defining the extent of the noncompetition obligation. Noncompetition obligations of an employee are valid after termination of employment subject to the employee receiving consideration therefor and subject to the obligation being reasonable in respect of its duration, subject matter, and geographical scope and not having the effect of depriving the employee of the ability to earn a living.

10.2 In your jurisdiction, will the enforcement of a noncompetition clause be subject to legal limitations (e.g., time, scope, geographic area, etc.) or registration with competition authorities?

See answer to 10.1.
11. JURISDICTION, CHOICE OF LAW, AND ARBITRATION

In certain jurisdictions, it is customary to include clauses regarding choice of law, jurisdiction and venue, and arbitration in share acquisition agreements.

11.1 In your jurisdiction, are there any restrictions relevant to share acquisitions by foreign parties as to: (i) the choice of applicable law; and (ii) the place where actions may be brought?

(i) French courts will generally enforce choice-of-law clauses in international contracts, providing that the law chosen has some connection with the transaction (for example, the law of the place of business of the target, seller, or buyer). However, if the target is a French company many issues arising in the context of acquisition thereof will necessarily be subject to French law (for example, the effectiveness of share transfer procedures and financial assistance rules). Accordingly, to avoid unnecessary complexity, share purchase agreements for acquisition of French targets are usually made subject to French law.

(ii) France is a signatory of the European Convention on Jurisdiction and Enforcement of Judicial Judgments in Civil and Commercial Matters of September 27, 1968 (Brussels Convention) as well as the Convention on Jurisdiction and Enforcement of Judicial Judgments in Civil and Commercial Matters of September 16, 1968 (Lugano Convention), which require that French courts respect choice-of-jurisdiction clauses in commercial contracts such as acquisition agreements, provided that the jurisdiction chosen is one of the signatory states. When such a contract provides for election of a jurisdiction of a non-signatory state, French courts will enforce the choice if it is precise, unequivocal, and unambiguous.

11.2 Is arbitration possible and, if so, is the award final and enforceable or is it likely that it will be re-examined by a judicial body? Are there alternative dispute resolution procedures, such as mediation, that are well-developed in your jurisdiction?

A clause submitting disputes in a share purchase agreement in an international transaction to arbitration, and stipulating that there will be no appeal, will be upheld by French courts. For an award rendered in arbitration to be enforceable, it must first be submitted to French courts in an exequatur proceeding; in such proceedings the award may be overturned only in certain limited circumstances (those set out in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, which involve such matters as a void arbitration clause, defects in designation of the arbitrator or arbitral tribunal, an award going beyond the agreed scope of the arbitration, failure to respect the rights of both parties to participate in the proceedings, and violation by the arbitrator or tribunal of mandatory rules of public order, for example as to independence and impartiality). It is also possible for the
parties to provide for mediation of disputes, for example as a precursor to arbitration.

11.3 Are there any reasons specific to your country’s judicial system that favor or require selecting arbitration, mediation, or other alternative dispute resolution procedures, as opposed to court proceedings, for the resolution of business disputes?

Arbitration or other alternative dispute resolution procedures may be desirable for confidentiality and where a multi-national context for resolution of disputes (with one or more arbitrators from countries other than France) is deemed appropriate. However, when a party expects a dispute to involve issues demanding an unequivocal response that are not particularly complex or politically sensitive, normal court resolution of the dispute may be preferable.

12. OTHER ISSUES

12.1 Is it typical to include a clause with respect to the allocation of attorney’s fees in a share acquisition agreement?

It is typical to include in an acquisition agreement a clause providing that each party will bear its own attorney fees.

12.2 Does your jurisdiction have legislation, sometimes called “Bulk Sales Laws,” that protects a seller’s creditors from the risk that the assets of the seller will be sold in bulk, leaving the seller with no assets that its creditors may seize? Protection is often provided by requiring that prior notice of the sale be given to the seller’s creditors and, if notice is not given, by making the buyer liable to the seller’s creditors. Could such legislation be relevant to a share sale in circumstances where the only asset of a seller is the shares it owns in the target company?

Under general fraud principles, any transaction that constitutes a fraud on creditors can be held void.

Further, the transaction can be voided in certain circumstances in case of seller’s insolvency (see 7.4 point (3)).

12.3 Is it possible in your jurisdiction for the parties to be ordered by a governmental or other authority to undo or reverse all or part of the share acquisition transaction after closing? If so, under what circumstances, and are there ways of reducing or eliminating this risk?

Governmental authorities may undo or reverse all or part of a share acquisition transaction when proper competition clearance has not been obtained, as described in section 6. This risk can be eliminated by obtaining the clearance before consummation of the transaction.

12.4 Does your jurisdiction impose a deemed standard of knowledge on a buyer of shares? Would such a standard of knowledge be imposed in circum-
stances where a buyer has relied on representations and warranties of the seller and written disclosures by the seller in the form of a schedule to the share acquisition agreement?

Seller and buyer each have an obligation to act in good faith, which may result in seller having some duty to disclose and buyer having some duty to investigate, depending on the circumstances. The extent of the parties’ duty depends on their relative sophistication, and it is often difficult to predict how the duties will be interpreted in a given case. However, generally the buyer may rely on representations and warranties, as modified by written disclosures.

12.5 If, during share acquisition transactions with U.S. buyers or sellers: (i) you have experienced significant differences between your system of law and the U.S. system of law; or (ii) there are other significant issues that any foreign buyer should be made aware of in purchasing shares in your jurisdiction and that are not dealt with above, please comment briefly.

Under French law, when a party’s obligation is subject to a condition known as a condition potestative, which is applicable at the discretion of that party, the obligation is void. Moreover, contractually agreed penalties (such as liquidated damages clauses) can be adjusted by French courts if they are deemed excessively large or small.