Global Private M&A Guide - Limited External Content - Spain

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

In Spain, it is common that thorough due diligence is conducted and used as an aide to identify breaches and potential issues, which are then addressed in the acquisition documents, including by means of remedies or actions to be taken before signing, between signing and closing, and post-closing.

Although areas of concern may differ depending on the type of business, the environment, privacy and compliance have become key issues to investigate.

**Pricing and payment**

Spanish M&A practice is increasingly internationalized and Spain can now be considered a sophisticated market for M&A transactions.

Business acquisition agreements are not regulated by any specific law, and their structure and content can and will vary greatly depending on the particularities of the transaction and the covenants, agreements and undertakings of the parties to the agreement.

There are no special restrictions regarding pricing and payment in Spain from a strictly legal/corporate point of view. When the transaction is notarized in Spain (for example, where a share transfer refers to bearer shares or to participation quotas in a limited liability company (Sociedad Limitada), or in certain transfers of assets such as real estate), the Spanish notary public will demand evidence of how payment of the purchase price is made (for instance, by attaching a copy of wiring instructions of a bank transfer or a copy of the bank check) and the identification of the parties' respective beneficial owner.

Generally, share purchases are more common than asset purchases. Other types of acquisition methods, such as mergers, may also be suitable depending on the circumstances.

In terms of precontractual obligations, the parties in an M&A negotiation are under a duty to act in good faith. Anyone in breach of that duty will be liable to compensate for direct damage caused.

Share and asset deals may be subject to the approval of the general shareholders' meeting. The Spanish Companies Act requires that any acquisition, sale or contribution to another company of material assets must be approved by the general shareholders' meeting. The Companies Act presumes that  an asset is material when the amount of the transaction exceeds 25% of the total value of the assets in the last approved balance sheet.

*Share sale*

Spanish practice around share purchase agreements (SPAs) is similar to standard international practice, including practices related to price determination and adjustment (cash-free debt-free/normalized working capital adjustment, net asset value (NAV) adjustments, locked box structures, earn-outs, etc.), conditions precedents to completion, including mandatory (such as merger control, if applicable) and voluntary conditions (such as material adverse effect conditions), interim period obligations, representations and warranties, and indemnity undertakings.

Contracts or administrative authorizations/permits/licenses may contain "change of control" provisions that trigger the need for the prior consent of the counterparty to the contract or the relevant public authority to complete the sale, in order to avoid potentially adverse effects that may arise, such as the increase of the compensation payable under the contract, or the right to terminate the contract in advance.

*Asset sale*

Although a share deal tends to be the preferred acquisition method, in certain circumstances, an asset purchase has advantages that may make it more attractive to a buyer. For example, the buyer may favor an asset purchase in order to limit the inheritance of liabilities to the assets acquired rather than to the whole company (although the buyer may still be liable for certain pre-transfer liabilities for labor, tax and environmental matters).

The purchase of all of a company's assets is regarded as a "going concern" purchase and not as the purchase of each individual asset. However, each individual asset must be transferred in accordance with the transfer formalities that apply to that type of asset. For some assets, this will simply be the delivery of the asset to the buyer. In other cases, the formalities are more prescriptive and may require notarization and/or registration with public registries, as is the case with respect to real property), in rem rights (e.g., mortgage, pledge) or intellectual property (e.g., trademarks).

Permits and licenses are not automatically assigned in transfers of going concerns, so an application for consent to assign must be made to the relevant authority. Alternatively, an application for a new license or permit will be required. In addition, contracts are not automatically assigned. However, as indicated before, some liabilities such as tax and labor liabilities may be transferred as part of the asset purchase.

**Signing/closing**

Normally, signing and closing take place at the same time, unless closing has been made subject to the fulfillment of conditions precedent. In this case, the agreement becomes binding and enforceable on signing, but the sale and purchase do not take effect until the transfer of shares/assets on closing.

It is common (and in certain cases mandatory, such as when the transfer refers to bearer shares or to participation quotas in a Spanish Sociedad Limitada) to formalize the transfer before a notary public.

## Approvals/registrations

**Foreign investment restrictions**

Spain has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed.

The foreign investment review (FIR) regime is limited to certain sectors. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Spain has a mandatory and suspensory merger control regime, which means that transactions that meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed.

It is also necessary to consider EU merger control rules. Mergers involving companies active in several member states and reaching certain turnover thresholds are examined at European level by the European Commission. This allows companies trading in different EU member states to obtain clearance for their mergers in one go. For further information, see the more detailed section on "Antitrust/merger control".

**EU Foreign Subsidies Regulation**

As of 12 October 2023, the EU Foreign Subsidies Regulation (FSR) requires qualifying transactions, and bids in response to certain large public tenders in the EU, to be notified for upfront clearance by the European Commission where the companies involved have benefited from foreign financial contributions (a broad concept) that exceed certain (low) thresholds. Acquisitions of a target with annual revenues in the EU of at least EUR 500 million will trigger FSR deal notifications. Acquisitions of smaller targets will not, regardless of deal value. Outright mergers and large joint ventures will trigger a notification requirement if the EUR 500 million EU-wide revenue threshold is met by one of the merging parties or the joint venture.

**Other regulatory or government approvals**

Approval by the competent regulator may be required for acquisitions of companies that are subject to specific regulatory supervision, such as financial institutions, airports, telecom providers, etc.

## Employment

**Method of transfer under local law**

*Share sale*

The mere transfer of shares is not considered a transfer of an undertaking and will not involve the transfer of employees, but simply a change in the ownership of the employer (not a change in the employer). The buyer inherits all the rights, duties and liabilities by virtue of being the new owner of the target company.

*Asset sale*

If a company transfers a group of assets that functions independently and permits continuity in the business, a transfer of undertakings will occur and the affected employees will automatically transfer to the acquiring company. The transfer could entail the entire company's business or an identifiable part of it.

*Mergers and spin-offs*

If a company merges with another company or implements a spin-off and transfers a group of assets that function independently and permit continuity in the business and services after the transaction, a transfer of undertakings will likely occur and the affected employees will automatically transfer to the buyer company.

**Transfer of business**

*Acquired Rights Directive and automatic transfer of employees*

If the requirements for an automatic transfer exist, the employees will automatically transfer to the transferee, which will take over the employment rights and obligations of the transferor. If those requirements are not met, each employee will need to consent to the transfer.

The transferee becomes jointly and severally liable with the transferor for a period of three years for all those obligations unsatisfied before the transfer for existing employees. Specific statutes of limitations may apply depending on the specific liability involved. If the transfer is subsequently declared a felony, both the transferor and the transferee are held jointly and severally liable for obligations arising after the transfer.

Unless otherwise agreed, any collective bargaining agreements applicable to the affected employees continue to apply until they expire or a new collective agreement is applicable.

If there is a significant change in the ownership of the employer resulting in a change in the board of directors, the main activity or approach to the activity, top executives (normally, the general manager) have the right to terminate their contracts and receive a severance compensation of seven days of cash salary per year of service up to six months' salary. The employee can terminate the contract in the three-month period following the implementation of the change.

**Approval or consultation requirements**

*Works council/employee information requirements*

If the transfer of undertakings involves an automatic transfer of employees, both the transferor and the transferee are obliged to notify the employees' representatives (or the affected employees in the absence of representation) of the proposed business transfer. The notification should be provided reasonably in advance, normally no less than 15 days.

The information requirements stipulated under Royal Decree Law 5/2023, of 28 June, establishes that when a company is going to change its legal structure (via transformation, merger, spin-off or universal transfer of all its assets and liabilities), the directors must issue a report for the employee representatives, or for the employees themselves if they do not have representatives, to inform them of the impact that the transaction will have on the labor relations and employment conditions. The report must be made available to the employee representatives or the employees themselves at least one month before the General Shareholders Meeting is held to approve the transaction.

*Works council consultation requirements*

If the transferor or transferee anticipates adopting new measures in connection with the employees as a result of the transfer, depending on the measures to be adopted, they may be obliged to consult with the employees' representatives and to follow specific procedures established by law.

## Tax

The acquisition of shares is usually not subject to indirect taxation unless, under certain circumstances, the target company owns significant real estate (more than 50% of total assets).

For Spanish tax resident sellers subject to corporate income tax, the capital gain arising from the sale of shares is usually 95% exempt from taxation, provided several requirements are met (i.e., more than 5% of ownership for the last 12 months, the company is not a mere asset holding company and it is subject to corporate income tax). Individual sellers are taxed under personal income tax at a rate that ranges from 19% to 28%.

For foreign tax resident sellers, the capital gain from the sale of shares is usually subject to Nonresident Income Tax (NRIT) at a rate of 19%, unless a double tax treaty provides otherwise.

If the seller of a real estate property located in Spain is a nonresident, the buyer is obliged to withhold 3% of the gross amount to be paid on account of the seller's NRIT.

The acquisition of assets may be subject to either transfer tax or value-added tax (VAT) (and stamp duty, if applicable), depending on whether the deal qualifies as a transfer of going concern. A transfer of going concern is not subject to VAT, but certain assets (such as real estate assets) may be subject to VAT or transfer tax.

For Spanish tax resident sellers subject to corporate income tax, the capital gain from the sale of assets is usually taxed at a 25% rate. Individual sellers are taxed under personal income tax at a rate that ranges from 19% to 28%.

Spanish tax laws provide a special tax neutrality regime for corporate reorganizations (mergers, carve-outs, assets contributions, etc.) that allow the taxpayer to defer taxation of built-in gains arising from a reorganization that is conducted for valid economic reasons.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

Spanish M&A practice is increasingly internationalized and Spain can be considered a sophisticated market for M&A transactions. Business acquisition agreements are not regulated by any specific law and their structure and content can and will vary greatly depending on the particularities of the transaction and the covenants, agreements and undertakings of the parties to the agreement.

Share acquisitions and asset acquisitions are the key deal structures used in Spanish private M&A transactions. Other types of acquisition methods, such as mergers, may also be suitable depending on the circumstances. Schemes of arrangement are not contemplated by Spanish law.

*Share/asset deals*

In Spain, share purchases are generally more common than asset purchases. However, an asset purchase has advantages that may, in certain circumstances, make it more attractive to a buyer, for example, the buyer might favor an asset purchase in order to limit the inheritance of liabilities to the assets acquired, rather than to the whole company (although the buyer may, in any case, be liable for certain pre-transfer liabilities in relation to labor, tax and environmental matters).

Spanish M&A practice is familiar with both bilateral sales and auction sales. Auction processes are normally governed by a process letter prepared by the seller's advisers and structured in several phases: in an early stage of the process, bidders are normally asked to submit an indicative (nonbinding) offer on the basis of preliminary information and due diligence; as the process moves forward, those bidders that are preselected after the initial phase are normally requested to submit (after appropriate due diligence) a binding offer, together with a mark-up of the acquisition agreement previously delivered by the seller for these purposes.

*Mergers*

Under Spanish law, two or more companies can merge either by incorporation or by absorption.

In mergers by incorporation, the merging companies are wound up without going into liquidation and are succeeded by a new company, incorporated as a result of the merger, which acquires, by universal succession (transfer by operation of law), all assets and liabilities (including contracts, except where the contract itself prevents such a transfer). The former shareholders of the extinguished companies become shareholders of the successor company in accordance with the share exchange rate agreed as part of the merger.

In mergers by absorption, one or more companies (the absorbed companies) are wound up without going into liquidation and are absorbed by another company (the surviving company), which acquires, by universal succession, all their assets and liabilities. The former shareholders of the absorbed companies become shareholders of the surviving company in accordance with the share exchange rate agreed as part of the merger.

Mergers can thus be used in Spain as an alternative business transfer method, and Spanish law additionally regulates other reorganization operations, including partial or total demergers or spin-offs and global assignments of assets and liabilities, which also have the advantage of universal succession.

Spanish law allows and regulates all of such reorganization operations cross-border.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Spanish corporate law provides for a wide range of company types. The most commonly used are limited liability companies, in the form of either:

Sociedades Anónimas (SA), i.e., "corporations"

Sociedades de Responsabilidad Limitada (SRL or SL), i.e., "limited liability companies"

Sole shareholder companies are permitted under Spanish law and no major restrictions apply to them, other than the requirement of adding the word "unipersonal" (i.e., "sole shareholder") or its abbreviation "U" (so we often see "SLU" or "SAU") to the corporate name and the obligation to keep a special book to record agreements between the company and the sole shareholder.

SAs are the most common corporate vehicle in Spain for multinationals and listed companies. However, the use of SLs is more frequent since Spanish corporate law establishes more stringent requirements for operating an SA, including an increase of the minimum capital required to incorporate a company.

## What are the different types of limited liability companies?

Spanish limited liability companies generally take the form of: (i) an SA; or (ii) an SL.

In general terms, SL are more suitable than SA for small and medium size companies and SA are normally used for larger companies, such as listed companies (where the use of SA is mandatory). However, apart from some differences with respect to specific items (such as the minimum share capital, the valuation of the contributions in kind or the term of the directors appointment), in practical terms both types of companies are flexible enough to accommodate to different investment structures, including the possibility to set up restrictions to the transfer of shares (such as rights of first refusal, rights of first option, drag along rights and tag along rights) and the allocation of different economic rights to the shares.

## Is there a restriction on shareholder numbers?

There is no restriction on the number of shareholders. Therefore, both SAs and SRLs can have as many shareholders as convenient on the basis of the particular circumstances of the relevant transaction.

## What are the key features of a share sale and purchase?

Spanish practice is familiar with the main international standards with respect to the structure and content of the agreements governing the acquisition of shares. An SPA is usually prepared and it is fairly common to face provisions relating to price determination and adjustment (cash-free debt-free/normalized working capital adjustment, NAV adjustments, locked box structures, earn-outs, etc.), conditions precedent to completion, including mandatory (such as merger control, if applicable) and voluntary conditions (such as material adverse effect conditions or waiver to change of control provisions), interim period obligations, representations and warranties, and indemnity undertakings.

In terms of transfer formalities, the following applies:

Shares in SA companies may be represented by either share certificates or accounting entries and may be freely transferred (unless the bylaws set out otherwise when shares are registered, e.g., specific transfer restrictions, such as first refusal rights in favor of other shareholders or the company itself). If shares are represented by share certificates, they can be transferred by the endorsement of the relevant share certificates to the buyer. Transfer of unregistered (bearer) shares is performed by handing over the relevant certificates, but the transfer will not be effective vis-à-vis third parties until notarized before a notary public (for transfers carried out without the intervention of a financial institution or securities broker). Notarizing transfers of shares (even if not legally required) is common practice. Transfers of registered shares must also be recorded in the shareholders' register.

SL share capital is represented by quotas, which are not "negotiable securities" and cannot be represented by share certificates or accounting entries. An SL cannot be listed on the securities markets. SL quotas must be transferred by means of a notarial deed (and the transfer recorded in the quotaholders' register).

Share deals are not subject to consultation or approval by employees, although it is common practice to inform employees as a matter of courtesy. However, if, as part of the share deal, it is envisaged that employment-related measures will be adopted that will imply material changes in the working conditions, geographical mobility, dismissals, etc. of the employees, it will be necessary to open a consultation with employee representatives to inform and negotiate with those representatives regarding the measures to be taken and their effect on employee working conditions — following the procedures set out in the Spanish Workers' Statute.

Share deals may be subject to the approval of the general shareholders' meeting. In this regard, Article 160 of the Spanish Companies Act requires that any acquisition, sale or contribution to another company of material assets must be approved by the general shareholders' meeting. The Companies Act presumes that an asset is material when the amount of the transaction exceeds 25% of the total value of the assets in the last approved balance sheet.

## What are the key features of an asset sale and purchase?

An asset purchase agreement is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction. In asset deals, it is common to see most of the topics described above in respect of the share deals, including purchase price adjustments, conditions precedent to completion, interim period obligations and warranties and indemnities.

In relation to transfer formalities, each individual asset, liability and contractual position within the scope of the agreement must be transferred in accordance with the particular transfer formalities that apply to it. In this sense, the following should be highlighted:

For some assets, the transfer formalities will be fulfilled simply by delivering the asset to the buyer, but in other cases, the formalities are more prescriptive and may require notarization and registration with public registries, as is the case with respect to real property, in rem rights (e.g., mortgage, pledge) or intellectual property (e.g., trademarks).

Permits and licenses are not automatically assigned in transfers of the business' entire assets (i.e., transfers of going concerns), so an application for consent to assign will have to be made to the relevant authority, or a new license or permit will be required, which may be a disadvantage for some asset deals.

Contracts are not automatically assigned, unless the assignment is specifically permitted under the relevant contract.

In some cases, particularly when the asset transfer refers to a business unit that is transferred as a "going concern," tax, labor and environmental liabilities may be transferred to the buyer as a matter of law.

Asset deals do not require prior consultation with or approval of employees, although there is an obligation to inform employees where an entire business is being sold. As with share acquisitions, if, as part of the asset deal, it is envisaged that employment-related measures will be adopted (e.g., material changes in working conditions, geographical mobility, dismissals, etc.), it will be necessary to open a consultation with employee representatives to inform and negotiate with those representatives regarding the measures to be taken and their effect on employee working conditions — following the procedures set out in the Spanish Workers' Statute.

As in the case of share deals, asset deals may be subject to the approval of the general shareholders' meeting. In this regard, Article 160 of the Spanish Companies Act requires that any acquisition, sale or contribution to another company of material assets must be approved by the general shareholders' meeting. The Companies Act presumes that an asset is material when the amount of the transaction exceeds 25% of the total value of the assets in the last approved balance sheet.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

Letters of intent and term sheets are common in Spain. Although they are nonbinding by nature, the binding character of the document will ultimately depend on the precise content and wording of the document, as well as the circumstances surrounding the transaction and the conduct of the parties.

The content of these types of documents is normally dual: on the one hand, the parties set out the anticipated terms of the proposed transaction and other ancillary matters on a nonexhaustive and nonbinding basis; on the other hand, the parties set out certain obligations and undertakings in connection with the negotiation process generally, which are intended to be legally binding and enforceable in accordance with their terms. Binding provisions usually include confidentiality, exclusivity, expenses and taxes, governing law and jurisdiction/arbitration.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** It is common to include an exclusivity clause prohibiting the parties from negotiating and exchanging information with third parties during a limited period. Normally, the exclusivity undertaking is assumed by the seller (so it undertakes to negotiate with the buyer only), is configured as a binding commitment and, depending on the particularities of the transaction and the bargaining position of the parties, can be supplemented by a penalty clause.

**Break fee:** It is not common to include break fees in letters of intent unless linked to any breach of binding obligations (e.g., breach of an exclusivity undertaking).

**Confidentiality:** It is typical to include a broad provision on confidentiality regulating the exchange of information and documentation between the parties. As in the case of exclusivity, confidentiality provisions are configured as binding and, depending on the particularities of the transaction and the sensitivity of the information to be exchanged, can be supplemented by a penalty clause.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Exclusivity agreements and confidentiality agreements are relatively common in Spain. However, it is also common to include a comprehensive confidentiality/exclusivity clause in the term sheet or letter of intent rather than a separate agreement.

The decision to configure the relevant undertaking as part of the term sheet/letter of intent or as a separate agreement will depend on the particularities of the transaction (complexity, duration of the negotiations, sensitivity of the information to be disclosed, the timing of the information disclosure, etc.).

## Is there a duty or obligation to negotiate in good faith?

The parties in an M&A negotiation are under a duty to act in good faith. Anyone in breach of this duty will have to compensate for direct damage caused (normally the costs of the negotiations).

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Fairly common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash-free/debt-free with a normal level of working capital (purchase price based on earnings before interest, taxes, depreciation, and amortization (EBITDA) multiple (or other multiplier)) is fairly common, as well as locked box structures. NAV is rarely seen, though this type of adjustment may be particularly relevant in certain cases (e.g., in businesses where there is regular movement in fixed assets).

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is usually prepared by the buyer, although, depending on the particular circumstances of each case, it is not uncommon for the seller to prepare the closing balance sheet.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Not necessarily, although common in medium-sized and large deals.

## Is an earn-out common?

Frequency/market practice: These are used particularly in industries where sellers continue to be involved (e.g., advertising).

## Is a deposit common?

Frequency/market practice: Rarely.

## Is an escrow common?

Frequency/market practice: Fairly common.

## Is a break fee common?

Frequency/market practice: Rarely, although it may be used in certain cases depending on the circumstances of each particular deal.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Material Adverse Change (MAC)/MAE provisions are familiar to Spanish market practitioners. The decision regarding the inclusion of an MAC/MAE condition precedent in the agreement will ultimately depend on a number of factors, including the strategies and bargaining position of the parties, the length of the interim period between signing and closing, the type of deal and the nature of the business being sold.

## Is the MAE general or specific?

Frequency/market practice: Specific is more common.

## Is the MAE quantified?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common; more common in certain sectors and if sellers are individuals.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Fairly common.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common in conjunction with a noncompete.

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Fairly common.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; generally, access is obtained for private deals, but some sellers resist and seek to mitigate this by adding exceptions and limitations. There are competition law issues around potential gun-jumping.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Fairly common; updating schedules is common but limited to things such as lists of contracts or employees in the ordinary course of business. Confirmation of representations and warranties at closing is common. Where there is a material breach, there may be a right to terminate.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers commonly seen and often quantified by reference to a euro amount.

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge is often qualified (frequently by reference to a specific group).

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Fairly common, subject to negotiation around the precise terms of the warranty.

## Is disclosure of the data room common?

Frequency/market practice: It is very common to negotiate the disclosure of the data room and the effects of such disclosure on the seller's liability.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: This is not common between signing and completion.

## Is a bring-down certificate at closing common?

Frequency/market practice: A bring-down certificate at completion is common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is common.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Common.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: It depends on the particulars of each transaction. In general terms, it is not unusual to see ranges from 10% to 50% of the purchase price in larger deals and up to 100% in small deals.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: They usually apply to warranties only.

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties are often excepted (e.g., title, capitalization, authority). Tax and other specific areas of concern/identified liabilities generally are not capped or have higher caps.

## Is a deductible or basket common?

Frequency/market practice: Both are common.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: Fairly common; a general survival of 12 to 24 months is common.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud, tax and social security (statute of limitations).

## Is warranty insurance common?

Frequency/market practice: Warranty insurance is increasingly seen in the Spanish market and is becoming more popular in certain deals (for instance, when the seller wants a clean exit).

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common; common for actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common; common for actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Fairly common.

## Is there an exclusion of consequential damages?

Frequency/market practice: It is fairly common to negotiate the definition of damages, including or excluding certain items (such as consequential damages or loss of profit) on the basis of each particular case.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: It is common to have provisions dealing with the impact of the knowledge of the buyer. Depending on the parties' respective bargaining position and the particulars of each case, knowledge of the buyer may or may not exclude the seller's liability for breach of warranties.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes.

## What is the common governing law?

Frequency/market practice: It is common to choose Spanish law if the target is in Spain.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration is more common. International Chamber of Commerce arbitration in London or Paris or arbitration administered by a Spanish arbitral body in a Spanish venue is common.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: No stamp duty is payable on share sales.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: Fairly common.

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