Asset acquisition documents Q&A: Mexico

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Country Q&A | Law stated as at 31-Aug-2019 | Mexico

This Q&A provides jurisdiction-specific commentary on Practice note, Asset acquisition documents: Cross-border and forms part of our *Cross-border private company acquisitions*.

Asset acquisition documents

1. In an asset or a business purchase, what are the main acquisition documents and who is generally responsible for preparing the first draft?

Purchase agreement

The main document in an asset/business sale is the asset purchase agreement. Subject to specific formalities that may be required under Mexican law in connection with the assets to be transferred (for example, execution of public instruments, in the case of real estate assets), this is the main document that:

- Transfers the seller's title and beneficial ownership in assets to the buyer.
- Sets out all of the substantive terms of the transaction.

In cross-border assets or business acquisitions, the parties must structure the transaction carefully, taking all relevant factors into consideration, especially the location of the assets and/or target business.

Ancillary documents in a cross-border asset/business acquisition may differ considerably from those used in an entirely domestic transaction, as a result of the formalities (for example, notations in public registries or filings before certain authorities) in certain jurisdictions applicable to different types of assets. In our experience, cross-

border business acquisitions almost always include a combination of asset purchases and share purchases of certain target subsidiaries.

In the context of a cross-border transaction involving the sale of assets/businesses in multiple jurisdictions, the main structures used in Mexico are:

- Umbrella agreement structure.
- Hive-down.

In the case of an umbrella agreement structure, the parent entity of each company in the buyer group and seller group negotiate and enter into a framework purchase agreement, in which the parties set out the main terms and conditions of the transaction, including the key representations, warranties and covenants, and an express obligation on each parent entity to cause the sale and purchase of the relevant assets/business in each jurisdiction.

In case of a hive-down structure, the seller transfers the target assets into a special purpose vehicle so the buyer can make a more straightforward purchase, mainly by purchasing the stock of the special purpose vehicle. This structure requires oversight by the buyer in connection with the transfer of the assets to the new vehicle and the execution of a stock purchase agreement.

If the transaction is bilateral, it is more common that the buyer will prepare the first draft, while in a competitive auction the seller will typically draft the agreement.

Additional key documents

In addition to the purchase agreement, parties might often enter into:

- A non-binding or partially binding letter of intent or memorandum of understanding that outlines the main commercial and legal terms on which the transaction and purchase agreement will be based.
- A confidentiality agreement (or non-disclosure agreement) before any information is disclosed in due diligence.

Depending on the type of assets being transferred, the following documents might also be required:

- Public instruments and liens evidence certificates.
- Corporate documents (that is, endorsement of shares and entries in ledgers, among others).
- Assignment of securities.
- Escrow or trust agreements as holdback and/or security mechanisms.
- Employment related notices.
- Internal and third-party authorisations and approvals (that is, board or shareholders approvals, creditors' or governmental authorities).

2. Outline the structure and key substantive clauses in an asset or a business purchase agreement. Are seller warranties/indemnities typically included and what main areas do they cover? In relation to cross-border transactions with a connection to the UK, have you noticed the introduction of any "Brexit" wording or an increase in the use of material adverse change clauses?

Structure

The key provisions of an asset purchase agreement are:

- **Parties.** Careful consideration must be given to the parties involved in the transaction and therefore included in the purchase agreement. In a bilateral asset/business sale, this area is pretty straightforward, as the parties will be a buyer and a seller. However, where there are multiple sellers or the buyer is part of a group, greater consideration needs to be given to which of these are made party to the agreement. For example, consideration should be given to whether the buyer group and/or seller group needs to appoint a representative to act on behalf of the respective group. The buyer may also incorporate a new subsidiary or special purpose vehicle to undertake the acquisition, in which case there are structuring issues that will need to be addressed. Additionally, in certain circumstances, it may be necessary for the obligations of the buyer and/or the seller to be guaranteed by a third party, in which case that third party would usually be a party to the purchase agreement.
- **Backgrounds.** The purchase agreement should clearly identify the target's business and/or the assets to be purchased, and any relevant background information regarding chain of title.
- **Representations and warranties.** Both parties will typically provide representations and warranties covering the identity of the parties, as well as their ability and authority to enter into the purchase agreement and perform the prospective transactions. The buyer will also usually require the seller to provide representations and warranties in relation to matters which may affect the value of the business/assets being acquired. Most commonly, these will relate to the:
    - rights to, condition, and adequacy of the assets;
    - absence of liens;
    - authorities of legal representatives, and good standing;
    - past conduct and trading of the business and/or assets, and compliance with laws and regulations;
    - preparation and maintenance of the business accounts;
    - maintenance of business records;
    - validity, compliance obligations, liabilities and onerous terms included in the contracts entered into by the business;
    - properties used by the business, and any environmental concerns;
    - ownership or rights to, registration details and adequacy of the intellectual property and IT systems of the business;
    - employees and their employment arrangements;
    - current, threatened or potential future litigation or investigations;
    - nature and adequacy of insurance coverage; and

    - accuracy and completeness of disclosures and any due diligence materials.

- **Agreement to buy/sell.** The purchase agreement should clearly and expressly state the parties' agreement for the seller to sell the assets/business and the buyer to buy the assets/business. This provision will commonly provide for the assets to be transferred free of any encumbrances and with all legal and beneficial rights and title attached, though this is subject to the commercial agreement between the parties.
- **Consideration.** The purchase agreement should clearly set out the consideration, including calculation and payment mechanics. In asset/business sales, the consideration will usually be subject to a number of adjustments (see *Question 10*), and clarity over how those adjustments apply is very important. It is common for the buyer and seller to negotiate additional protections such as holdbacks, earn-outs and gross-up provisions. In addition, if the consideration contains a non-cash component (for example, shares, loan notes, non-cash assets, or grant of licence), then additional amendments to the purchase agreement will need to be considered (see *Question 9*).
- **Covenants.** It is important to cross-reference the breach of a covenant to the events of default and indemnity clauses. Customary positive and negative covenants include (among others):
    - payment of liabilities;
    - filings and registrations;
    - non-compete;
    - non-solicitation;
    - delivery of documentation by closing or post-closing; and
    - confidentiality.

- **Conditions.** The agreement and/or closing are often conditional on a number of items. Conditions are usually those points that are key to the transaction's viability for the buyer, and are in addition to the deliverables required on closing (see *Question 5*).
- **Deferred closing undertakings.** Signing and closing often do not occur simultaneously. The purchase agreement will usually place restrictions on how the seller can operate the business in the intervening period, and set out management transition provisions. This can include both positive and negative undertakings. The buyer's main concern is to protect the value of the assets/business it is acquiring.
- **Closing mechanism.** A purchase agreement will typically include a provision detailing the procedure for closing to occur. The closing mechanism will usually be accompanied by provisions which specifically detail the parties' rights and obligations in respect of specific assets or categories of assets (for example, contracts and receivables). Closing provisions may include:
    - where and when closing will occur;
    - the process for payment of consideration;
    - the various documents that each party must produce and/or sign at completion;
    - the methods for transferring the assets; and
    - the execution of a bring down certificate expressly stating (among other things) that all conditions for closing have been met, and that all representations and warranties set out in an agreement and made at signing remain true and correct as of the date of the certificate.

- **Events of default.** This is a list of actions and/or omissions that can trigger termination and/or penalties under the purchase agreement.
- **Indemnity.** The buyer will usually require an indemnity in respect of the seller's representations and warranties.
- **Assets/liabilities to be transferred.** The list of assets/liabilities to be transferred will usually be scheduled or annexed to the purchase agreement. Preparation of this list usually requires heavy involvement from the client to ensure the sale assets are correctly identified. In a business sale, the buyer will want to ensure the enumerated assets sufficiently capture all assets required for the continued running of the business. If the item is not enumerated on this list, it will not be transferred.
- **Other matters.** The purchase agreement is likely to include additional provisions which deal with matters such as:
    - confidentiality;
    - tax and dispute resolution; and
    - standard boilerplate provisions.

Brexit

In our experience, the drafting of cross-border asset purchase agreements with an involvement in Mexico have not been affected by Brexit.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

The structure of Mexican asset purchase agreements is generally similar to that of the *Standard document, Asset Purchase Agreement: Cross-border*. That said, simply amending *Standard document, Asset Purchase Agreement: Cross-border* may not be the most efficient approach as, in our experience, Mexico treats certain matters contained in the document in a different way. Below is a non-exhaustive list of the sections that would require a different approach pursuant to Mexican laws and practices:

- **Employment matters.** This section requires careful drafting and varies greatly depending on the employment structure used by the target. For example, sometimes a buyer would rather terminate all current employee relations and rehire some of the employees under new conditions, or keep current employment conditions and include certain transition provisions in the employment clause.
- **Limitation of liability.** Depending on the party's requirements, representatives may seek to limit the definition of a claim to a final, conclusive and non-appealable judgment of a court, or to draft the definition as broad as possible. Careful drafting needs to be included in any provision under which the seller's liability is being limited, especially in terms of time. Consideration must be given to particular areas of law where the limitation period exceeds the standard limitation period, such as (among others):
    - tax;
    - employment;
    - social security contributions;
    - environmental;
    - anti-money laundering; and

    - anti-corruption, among others.

- **Good faith.** *Clause 30.3* is not market practice in Mexico.
- **Taxes.** Tax considerations usually depend on the mechanisms through which the payments are implemented and the specific characteristics of the transaction, as determined by the parties' respective tax advisers on a transaction-specific basis.
- **Third parties' rights.** *Clause 34.2* is not market practice in Mexico.
- **Insurance.** Typically, insurance clauses in a Mexican purchase agreement include an obligation on the seller's part to endorse all insurance policies in favour of the buyer and/or include the buyer as a first beneficiary under such policies.

3. Is it common to have recitals at the beginning of an asset or a business purchase agreement? How is a court likely to interpret the agreement if the recitals are inconsistent with the substantive terms of the agreement?

Yes, it is common for a purchase agreement to include a "background" section at the beginning of the document.

A court is likely to use any information set out in the background section to interpret inconsistencies, especially if the inconsistencies relate to the target's business and/or the assets to be purchased and any relevant background information on the chain of title, which are customary background provisions.

The "recital" or "background" section of the purchase agreement typically includes:

- Detailed information regarding the business of the seller.
- Background information regarding the seller's ownership of the purchased assets.
- Information regarding liens over assets, if any.
- Willingness of the parties to sell and acquire the assets.

4. With regards to terminology, which of the following alternative wording is more commonly used (if any), in an asset purchase agreement governed by the law of your jurisdiction:

- "Signing" or "exchange"?
- "Closing" or "completion"?

- "Disclosure schedule" or "disclosure letter"?
- "Closing agenda" or "documents list"?
- Any other?

The terms "signing", "closing", "disclosure schedule" and "closing agenda" are commonly used in Mexican purchase agreements. It is, however, more common to use the terms "execution" instead of signing, and "closing checklist" rather than closing agenda.

5. Please outline common conditions precedent. Are there any circumstances in which a condition precedent may be invalid or unenforceable?

Main conditions precedent

Under Mexican law, if the effect and validity of a purchase agreement is subject to conditions precedent, the agreement has no effect until all conditions precedent are fulfilled or waived by the respective party. There are three types of conditions in Mexican purchase agreements:

- Positive conditions (*condiciones de hacer*).
- Negative (*condiciones de no hacer*).
- Delivery conditions (*condiciones de dar*).

The purpose of including conditions precedent is twofold: to provide an exit before a certain date without liability for breach of contract, and to be able to pursue indemnification, damages and loss of proceeds if any of the conditions are not met.

Common types of conditions

Common types of conditions include:

- **Due diligence.** The buyer might request that closing be subject to satisfactory completion of legal, financial and commercial due diligence. The seller might contest inclusion of this condition, because it may give the buyer discretion as to whether the condition is satisfied or not.
- **Antitrust approval.** If the transaction's effect or likely effect would be the substantial lessening of competition in the market, authorisation from the Mexican Antitrust Commission may be required.
- **Other regulatory approvals.** Depending on the assets and the business industry or sector, assets/shares may not be transferred without the prior approval of certain regulators; for example:

    - oil and gas;
    - financial institutions;
    - telecoms;
    - aviation; and
    - pharmaceutical sector.

- **Foreign investment approval.** Approval from the Foreign Investments National Commission may be required when a foreign entity participates in the capital stock of a Mexican company and the business activities of the Mexican company are included in the list of "limited activities" set out in the Mexican Foreign Investment Law.
- **Corporate approval.** Approval of the buyer's or seller's shareholders is sometimes a condition to completion (for example, where the incorporation documents of the relevant party require shareholder approval for material acquisitions or disposals, or where the entity is listed and the applicable listing rules of the relevant exchange require shareholder approval of the transaction).
- **Material adverse change.** Buyers will often seek to include as a condition to completion that no material adverse change to representations and warranties has occurred before closing. This can be a contentious topic in negotiations as, if it is included as a condition as opposed to a termination right of the buyer, the obligation will be on the seller to show that no material adverse change has occurred.
- **Third party consents.** It will be a condition that all necessary third-party consents to the transaction have been received. This will usually be from lessors or creditors, or from relevant clients that hold a right to terminate a specific agreement in case of change of control of target.
- **Legal opinion.** The buyer will often make it a condition that a satisfactory legal opinion from external counsel be obtained before closing.
- **Delivery of bring down certificate.** It will often be a condition that the seller must deliver a specific model of letter certifying, among other things, that, as at closing date:
    - the representations and warranties are true and correct;
    - all conditions precedent have been fulfilled; and
    - no covenants have been breached.

- **Transfer of employees.** If the employees are not employed directly by the target, their transfer to the buyer immediately before closing could be a condition to closing the transaction. (Under Mexican law, if a buyer buys all the assets relevant to the business operations of the seller, the buyer may be considered a "substitute employer".)

Transaction-specific conditions are also often included on a case-by-case basis, particularly in heavily regulated sectors.

Enforceability of conditions

Generally, conditions will be valid and enforceable unless a court rules to the contrary (because the condition is illegal).

Interpretation by courts should give preference to commercial arrangements between the parties provided in the corresponding agreement (*Article 78, Mexican Commerce Code; Articles 1851-1857, Mexican Federal Civil Code*). As most Mexican purchase agreements will include a provision that invalid or unenforceable clauses may be severed, if a court does find that a particular condition is invalid or unenforceable, the likely outcome is the severance of that condition from the agreement.

6. Is it implied that parties will use reasonable endeavours to fulfil conditions precedent within their control if there is no express obligation? Are the parties under a general duty to act in good faith in your jurisdiction?

There is a general principle under Mexican law, reflected in statute and case law, that "agreements are entered into to be fulfilled", which implies a duty of good faith and reasonable efforts by the parties of an agreement. This is also set out in Article 1796 of the Federal Civil Code.

Mexican courts have ruled that the term "good faith" generally implies the obligation to co-operate to achieve a contractual assurance and to make reasonable efforts to meet either party's intention (*Tesis I.3**o**.C.J./11, Semanario Judicial de la Federación y su Gaceta, Décima Época, l. XVII t. II, abril de 2015, p. 1487*).

7. Are there any foreign investment control rules in your jurisdiction that may be relevant in relation to an asset or a business acquisition?

Yes, the Mexican Foreign Investment Law establishes certain limitations on economic activities performed by foreign companies, and by Mexican companies with foreign investment. Depending on the economic activity of the target, approval from the Foreign Investments National Commission may be required.

All foreign investment in Mexican companies must be registered with the Foreign Investments National Registry (*Article 32, Mexican Foreign Investment Law*).

8. Are any terms implied by law as to the seller's title to the assets? Do these vary depending on the asset or category of assets being transferred? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

In Mexico, there is a main implied term regarding seller's title to the assets: possession of the asset implies ownership of it (*Article 798, Federal Civil Code*).

Mexican asset/purchase agreements usually include heavy representations and warranties, imposing a higher standard than implied by law. These might address (among other things):

- Liens.
- Third party rights.
- Price fairness.

9.If part or all of the consideration consists of new shares in the buyer or an exchange of assets, what provisions is the asset purchase agreement likely to contain in relation to those shares or assets?

Where the consideration consists of new shares, it is customary for the parties to enter into a subscription agreement including the terms and conditions of the issuance and acquisition of the new shares which is cross-referenced to the asset purchase agreement. The subscription agreement will typically include the obligation to execute a shareholders' agreement that will govern their relationship. Generally, the subscription agreement would include a clause under which the parties agree to execute a shareholders' agreement in the terms of the document attached as exhibit x of the subscription agreement. The parties would then execute a shareholders' agreement in that format. They are two different documents.

In addition, there are also a number of additional matters in respect of the new shares that might be incorporated into the purchase agreement and/or the subscription agreement, such as:

- Any due diligence and warranties to be given by the buyer (or the entity issuing the shares).
- Any necessary restrictions on the issuance of securities, or other matters which may have an impact on the value of the consideration securities.
- Corporate approvals for issuance of the shares to the subscriber (that is, shareholder approvals, waivers, entries in ledgers, issuing of shares certificates and notices).
- The execution of the subscription and the shareholders' agreement as a condition precedent.
- If the issuing entity is a listed company, incorporation into the purchase agreement/subscription agreement of any procedures or restrictions on issuance and trading imposed by the relevant listing rules.

10. What are the most common price adjustment mechanisms used in an asset purchase agreement governed by the law of your jurisdiction?

In Mexico the most common mechanisms are:

- **Holdback.** Where there are certain liabilities (for example, tax, litigation and labour) that may not be quantified at closing, the parties agree that the buyer will hold in escrow a certain amount to be either:
  - used to pay for those liabilities; or
  - released to the buyer, if the liabilities do not arise.

- **Earn-outs.** The purchase agreement will often include a base or initial purchase price which will be later revised to adjust the base price to the actual value of the sale (under a post-closing balance sheet) or to adjust the base price for insufficiencies or surpluses in working capital. Earn-out provisions usually address inconsistencies in (among other things):
  - book records;
  - relevant agreements;
  - creditors; and
  - intellectual property.

11. What factors are likely to affect the timeline of an asset purchase?

The timeline of an asset/business purchase is highly dependent on the particular circumstances of the transaction and the industry of the target.

Factors which can have the greatest impact on the timeline of a transaction include:

- **Regulatory approvals.** The requirement to obtain regulatory approvals can often have a substantial impact on timing. For example, antitrust clearance may take between six weeks and six months. Likewise,

transferring certain permits or licences that require the consent of a government authority may involve a substantial lead time.

- **Third party consents.** Obtaining third party consents for the transfer of key assets can often be an impediment to timely completion, as negotiations with third parties may be sensitive.
- **Due diligence.** Completion of due diligence and attending to any issues raised during that process can have an impact on the speed of completion, particularly in large and complex transactions.
- **Real estate.** In real estate asset acquisitions, preparation of the public instruments transferring real estate titles with public notaries may be time-consuming. Local state-level regulations applicable to the transfer of real estate require extensive background information and certificates from public records regarding (among other things) liens, tax and utilities payments.
- **Obtaining financing.** In a leveraged transaction where the purchase price is wholly or partly financed by debt, the buyer needs to ensure it leaves sufficient time to negotiate, agree and enter into financing arrangements with the relevant lender(s). In larger transactions, this usually takes a couple of weeks to complete, as lenders often need to seek approval internally, and will have comprehensive "know-your-customer" requirements.

12. Which act or document is used to transfer the assets or business in your jurisdiction? Would this act or document be regarded as the core closing step? Does this vary depending on the asset or category of assets being transferred (for example, would it be different in case of moveable assets or properties)?

The nature of the core closing act or document transferring title to the assets/business will mostly depend on the type of assets involved. Generally, the asset purchase agreement is the core closing document transferring title to the assets.

In a real estate asset acquisition, the public instrument by which the assets are transferred is the main document. However, registration of the public instruments with the relevant Public Registries of Property is also necessary to perfect the transfer of title against third parties.

Where intellectual property is transferred, in addition to the execution of the purchase agreement, filing with the Mexican Institute of Industrial Property is also required.

In case of receivables being transferred, in addition to the execution of the purchase agreement, the obligor must also be served with notice for the transfer to enter into effect.

13. Are there any stamp, document or transfer tax or other charge, or notarial or other fees, to be paid in your jurisdiction in connection with the transfer of assets or a business?

Stamp or similar taxes are not applicable in Mexico.

When a public notary is involved (whether to formalise the agreement in a public instrument as part of a transfer of real estate, or to ratify the signatures of the parties signing the purchase agreement), the public notary will charge fees. The fees to be charged by a public notary vary from state to state and are calculated considering other factors such as price of the transaction.

14. Can a seller (or its advisers, including legal advisers) be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Sellers
A seller could be found liable, if it is shown that a pre-contractual misrepresentation, misleading statement or similar matter both:

- Was relied on by buyer when entering into the purchase agreement.
- Has had a direct impact on the damages caused.

Advisers
It is highly uncommon for advisers, including legal advisers, to be found liable for pre-contractual misrepresentation, misleading statements or similar matters.

15. Do you draw a distinction between protection by warranty and protection by indemnity?

Yes. Representations and warranties are promises undertaken (mostly on the seller's side) which are relied on by the parties in entering into the agreement; whereas indemnities are obligations (again, mostly on the seller's side) to reimburse for damages and/or loss of profits suffered in specified circumstances, including from breach of representations and warranties. Indemnities can be limited in time and amount.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

In Mexican purchase agreements, the buyer typically seeks from the seller an indemnity against breach of a warranty, as opposed to the separate list of matters set out in *Standard document, Asset Purchase Agreement: Cross-border, Clause 13*). Accordingly, simply amending *Standard document, Asset Purchase Agreement: Cross-border* may not be the most efficient approach as, in our experience, Mexico has different approaches to certain matters contained in the document (see *Question 2*).

16. Are apportionments and prepayments provisions usually inserted in an asset or business purchase agreement to ensure that neither the seller nor the buyer obtain a benefit they have not paid for, or incur a cost without receiving a benefit?

Yes; apportionment and prepayment provisions are customary in Mexico.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

The approach in *Standard document, Asset Purchase Agreement: Cross-border; clause 10* is not materially inconsistent with the method employed in typical Mexican purchase agreements. However, simply amending *Standard document, Asset Purchase Agreement: Cross-border* may not be the most efficient option (see *Question 2*).

17. What assets or liabilities would transfer automatically to the buyer in an asset or a business sale? Is it possible to exclude the automatic operation of the transfer?

Generally, assets or liabilities would not automatically transfer to the buyer, unless:

- The purchase agreement provides a catch-all provision for the transfer of certain assets which are not otherwise specified but which are necessary to operate the business.
- The asset is attached to another asset (for example, a computer attached to an industrial machine) that was transferred.

When a buyer acquires all or almost all of the functional elements of the seller, the buyer may be jointly liable with the seller for employment and social security liabilities (*Article 41, Federal Labour Law; Tesis I.1**o**.T.J/11, Semanario*

Judicial de la Federación y su Gaceta, Novéna Época, t. XXVI, noviembre de 2007, p. 703). The automatic transfer of the foregoing liabilities may not be enforceable in Mexico. Therefore, buyers must give careful consideration to the target's employment and social security liabilities.

18. Is it usual to draft an asset or a business purchase agreement with extensive warranty protection?

Yes. However, the extension of seller representations and warranties in an asset/business purchase is highly dependent on the nature and circumstances of the transaction. Representations and warranties in an asset/business purchase will generally be less extensive than those in a share purchase, as the buyer is not assuming the same level of unknown liabilities or contingent liabilities.

It is also common for a buyer to seek extensive representations and warranties when the assets/business are connected to a regulated industry or sector (for example, oil and gas, or telecom). In these cases, the buyer would seek specific compliance representations and warranties regarding regulatory, commercial and operational matters.

In Mexican purchase agreements, representations and warranties and indemnification provisions are usually heavily negotiated clauses.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

While the scope and nature of warranties can differ greatly across different transactions, the approach in *Standard document, Asset Purchase Agreement: Cross-border* is not materially inconsistent with the method employed in typical Mexican purchase agreements. However, simply amending *Standard document, Asset Purchase Agreement: Cross-border* may not be the most efficient option (see *Question 2*).

19. How common are actions for breach of warranty?

Relatively common. In Mexico, most purchase agreements cross-reference the breach of a warranty to trigger a default and, as a result, indemnification rights (if provided) and claims for damages and loss of profits.

20. What remedies can be sought for breach of warranty?

See *Question 19*.

21. Can the agreement confer the benefit of warranties and indemnities or other terms of the agreement on a third party that is not a party to the agreement, and would that party be able to enforce them directly?

Provided that proper notice to the third party is given, it is possible for a third party to receive a benefit under an agreement to which it is not a party, and to enforce that benefit.

In a Mexican purchase agreement, it is possible for a third party to benefit from the indemnity provision of the purchase agreement if such benefit is provided for in the agreement and the third party would be able to enforce such provision.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

The inclusion of a "Third Party Rights" clause, as in *Standard document, Asset Purchase Agreement: Cross-border*, would not be a market practice in a Mexico law-governed document.

22. In the absence of agreement can the benefit of warranties be assigned to a later transferee of the assets or the business?

As long as the purchase agreement does not expressly prohibit such an assignment, a party may assign some or all of the benefits under the agreement to a third party, subject to certain exceptions (for example, in cases where the assignment is prohibited by law or when the nature of the benefit does not allow the assignment). However, prior consent of the assignee must be obtained in the case of covenants under the agreement.

23. If acting for the sellers, are there any common limitations sought on the extent of warranties?

Yes. Sellers would seek to limit warranties with "best knowledge" and "materiality" qualifiers and by including cure periods.

24. What is the usual time limit for claims for breach of general commercial warranties and tax warranties?

General applicable statutory provisions limit claim filing to five years for breach of a representation or warranty, including those relating to commercial or tax matters.

Other limits may also apply, depending on the subject matter of the representation or warranty breached. For example, in the case of real estate, the Civil Codes of some states may allow claims even after the tenth year.

Some types of claim, such as those relating to environmental matters, do not have limits.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

The approach implemented in typical Mexican asset purchase agreements is generally similar to that of *Standard document, Asset Purchase Agreement: Cross-border*. That said, simply amending *Standard document, Asset Purchase Agreement: Cross-border* may not be the most efficient approach as, in our experience, Mexico treats certain matters contained in the document in a different way (see *Question 2*).

25.Are warranties usually qualified by disclosure? If so, where are these disclosures found (for example, in a disclosure letter or a disclosure schedule attached to the asset or business purchase agreement)?

Yes, in most cases warranties are qualified by disclosure. This may be achieved by:

- Including a disclosure schedule into the asset or business purchase agreement.
- Attaching relevant specific disclosure documents to the asset or business purchase agreement.

In a less common approach, the parties may also create a generalised qualification of the representations and warranties through the deemed disclosure of all due diligence materials, typically based on the contents of a data room.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

In Mexico it is more common to require specific disclosures against each warranty, as opposed to general disclosure of everything in certain documents. Where the latter approach is preferred, it is typical for the contents of the due diligence materials to be deemed disclosed, with a comprehensive list detailing the documents, or even delivering the electronic materials containing those documents at or before closing, with an index of the documents annexed to the purchase agreement.

The suggested wording does not materially differ from the approach in the standard Mexican purchase agreement. It should be borne in mind that revisions elsewhere are required (see *Question 2*).

26. In the disclosures, do the sellers provide both general disclosures (disclosure of certain matters which appear in public records and/or which the buyer ought to be aware of based on searches or enquiries which a buyer might/ought to make) and specific disclosures (relating to actual matters which if not disclosed would be in breach of warranty/warranties given in the asset or business purchase agreement)?

See *Question 23* and *Question 25*.

27. Are specific disclosures usually cross-referred to the warranties to which they relate?

See *Question 25*.

28. If a buyer has actual knowledge of a matter which qualifies a warranty (but this matter has not been formally disclosed by the sellers in the disclosure letter or disclosure schedule), can the buyer still sue for breach of warranty?

Yes.

29. If there is a delay between signing and closing to satisfy a condition precedent, does the asset or business purchase agreement usually provide for warranties to be repeated at the time of closing?

Yes. Please see *Question 2* in relation to bring down certificates.

30. Is it common for the seller to take out insurance against warranty claims?

No. Mexican insurance institutions do not regularly provide these policies.

31. If the buyer is concerned about the seller's ability to pay compensation for breach of warranty, how could you address these concerns?

In Mexico, if a buyer were concerned that the seller could breach a representation, warranty or covenant under the purchase agreement and would not be able to cover compensation for that breach, a common practice would be to structure a security mechanism, with a parent company granting an unlimited guarantee or implementing a price adjustment mechanism (see *Question 10*).

Whenever a security mechanism is included, the parties should also draft detailed procedures to deal with how the security is triggered.

32. Is it common to state that the purchase price is deemed to be reduced by the amount of any payment made under the warranties and indemnities? If so, is this wording effective for tax purposes (that is, that claims are treated as an adjustment to the consideration rather than being subject to capital gains (or other relevant) tax, to the extent the latter applies)?

It is relatively common for the parties in Mexican purchase agreements to agree to treat any payments made in respect of a claim under the warranties and indemnities as a reduction of the purchase price.

Whether or not a payment made in respect of any claim is actually treated as reducing the purchase price for tax purposes will usually depend on the mechanisms through which the payments are implemented and the specific characteristics of the transaction, as determined by the parties' respective tax advisers on a transaction-specific basis.

33. Is it common to provide that the sellers will not compete with the target business for a given period after closing? If so, are there any restrictions on the duration and scope of these provisions?

Yes, it is common to provide that the seller will not compete with the target business for a given period after closing.

A non-compete provision should however be carefully drafted with the assistance of a legal expert on antitrust matters. Transactions in which one of the parties agrees not to compete with the acquired business (essential for the buyer), are carefully reviewed by the Mexican Antitrust Commission. Non-compete obligations must be drafted with reasonable limitations regarding:

- Time (for example, the statute of limitations could be a standard).
- Geography.

Generally, non-compete provisions are enforceable in Mexico. A suggested practice is to tie-up the non-compete covenant with a specific agreed payment amount per event of breach.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

Non-compete provisions require detailed and careful drafting with the assistance of a legal expert on antitrust matters, so as not to fall within the purview of the Mexican Antitrust Commission.

34. Is it common to have an entire agreement clause (excluding liability for any representations or warranties made during the course of negotiations that are not included in the agreement)?

Yes, an entire agreement clause is considered standard in purchase agreements, and will usually be drafted so as to exclude representations, warranties and promises not expressly included in the agreement.

Comparison with *Standard document, Asset Purchase Agreement: Cross-border*

The exclusion of liability for negligent misrepresentation or negligent misstatement based on the contents of the purchase agreement, such as that in *clause 26.3* of *Standard document, Asset Purchase Agreement: Cross-border*, would be unusual in a Mexican law-governed purchase agreement.

35. Can an asset or a business purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

As a general rule, yes. Parties to a purchase agreement are free to agree the law that will govern the agreement. However, Mexican law may still apply to certain assets due to their nature or registration requirements (for example, real estate, or businesses that require regulatory approvals).

36. What form of dispute resolution is commonly provided for in asset or business purchase agreements?

Although the parties are free to agree on the dispute resolution mechanism they prefer, most purchase agreements where the main assets are located in Mexico, or where the seller is a Mexican entity, provide for conflict resolution through the Mexican courts.

In cases where the transactions are of a sensitive or confidential nature, or the representation, warranties and covenants include a heavy technical component, it is common to agree on mediation, arbitration or expert determination.

37.Is it common practice (or a legal requirement) that each page of the agreement, schedules and/or appendices are initialled by the parties on execution of the agreement?

Yes.

38. In which scenarios is a shareholders' resolution required as one of the documents that the seller and/or buyer must deliver at closing?

A shareholders' resolution is required if the constitutional documents of the relevant party require shareholder approval for material acquisitions or disposals, or where the entity is listed and the applicable listing rules of the relevant exchange require shareholder approval of the transaction.

The suggested wording in *Standard document, Asset Purchase Agreement: Cross-border* does not materially differ from the market standard approach in Mexican purchase agreements. (It should, however, be borne in mind that revisions are required elsewhere; see *Question 2*).

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