**Asset sales – the Acquisition Agreement**

This section focuses on the acquisition agreement and the general issues which are particular to assets sales

**The acquisition agreement**

You are already familiar with the following clauses commonly found in a share sale agreement:

* Recitals
* Interpretation
* Shares to be sold
* Price
* Completion accounts\*
* Conditions precedent\*
* Completion arrangements
* Restrictive covenants
* Warranties
* Indemnities
* Seller protections
* Boilerplate clauses

An acquisition agreement in an asset sale will contain many of these provisions, **with the exception** of tax indemnities which are only relevant to share sales. There are also, on an asset sale, likely to be **limited** tax warranties, for example, in relation to the VAT position of the business and PAYE compliance.

The agreement in an asset sale will also need to include further provisions because of the way the transaction is structured. It is these further provisions which we will now consider.

**The acquisition agreement – contractual provisions**

In a business or asset sale the acquisition agreement must reflect the fact that the buyer is acquiring a collection of assets from a company, rather than just one asset (the shares) in a company. On a practical level, this will require additional work and documentation. You considered the different methods of transfer in the previous element. To reflect this purchase of several different assets, the contractual provisions should include:

1. **A description of the business being sold**  
   The buyer will only acquire those assets and liabilities which the agreement specifies as being part of ‘the Business’ being sold (with the exception of liabilities which pass by operation of law (principally employment liabilities assuming TUPE applies)). It is very important that ‘the Business’ is accurately defined especially where more than one business is operated by the selling company. The importance of having an accurate definition also links to the restrictive covenants which are intended to protect ‘the Business’.
2. **A list of the assets being acquired and liabilities to be assumed.**

* The assets being acquired are likely to include:
* premises;
* plant and machinery;
* stock and work in progress;
* third party contracts;
* intellectual property;
* employees; and
* (possibly) debtors (receivables).
* Conversely one or more of the creditors may form part of the liabilities being assumed; see point 8 below.

1. **A list of assets excluded from the sale:**

Agreements often contain a list of assets which are excluded from the sale for the avoidance of doubt, for example, tax repayments and benefits of insurance for the period up to completion.

The parties usually agree an “Effective Time” and any such assets/benefits that relate to the period before the Effective Time belong to the Seller, and any that relate to after the Effective Time belong to the buyer.

A common effective time is midnight on the completion date. However, if the business operates across multiple time zones this can be more complex to manage.

Shares and securities held by the seller are also frequently expressly excluded.

1. **A schedule of continuing contracts**

The agreement must specify the contracts (or categories of contract) of which the buyer wants the benefit for example, agency, distribution or other agreements with suppliers and customers which are fundamental to the business. We will be looking at how this is achieved later in this section.

1. **A schedule of employees**

The parties must consider the position regarding employees. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (‘TUPE’) are relevant here (you came across TUPE in earlier Topics and we will consider this further in relation to asset sales).

1. **A clause dealing with apportionments**

This will set out what the parties have agreed about apportioning outgoings and other payments incurred by the business, for example, utility charges and rental payments which straddle the period before and after completion. One approach may be that such outgoings are apportioned to the seller up to the date of completion, with the buyer taking responsibility for these payments from the agreed completion date.  An alternative to an apportionments clause is to use completion accounts (which we will look at later).

1. **Licences**

There may be provisions dealing with the granting or assignment of licences for IP rights etc. It may also be necessary to obtain a licence to assign the lease of any property used by the business.  This may be particularly important where a transitional services agreement is needed. This will be touched on in Topic 10.

1. **Provisions regarding debtors and creditors**

The parties will need to agree whether these will be included in the sale. This was touched on in element 1 of this Topic.

1. **Provisions relating to the records of the business**

The parties will need to determine which records can be handed over on completion and which should be retained by the selling company. The statutory books will remain with the seller but many of the PAYE and employee records, for example, will be required by the buyer to run the business after completion.

1. **Value added tax provisions**

Prima facie, VAT will be chargeable on a transfer of stock and capital assets of a business. However, there is an exemption which treats the transfer of the whole or part of a business as a going concern as outside the scope of VAT provided certain conditions are satisfied. You will consider the application of this exemption later in the tax element.

1. **Stamp duty land tax provisions**

Stamp duty land tax is the tax payable by the buyer according to the total value of ‘land transactions’ involved.

1. **Completion requirements**

Typically, these are listed within a clause or schedule to the agreement which sets out various obligations of the parties including obligations on the seller to:

* complete the sale of any real property transferring to the buyer;
* give the buyer possession of those assets transferring via delivery; and
* deliver to the buyer, in the agreed form, executed assignments / novations (as appropriate) of those assets which are not transferrable via delivery.

**Timing and confidentiality: Conditions Precedent**

Whenever a third party is to be approached, either for permission to assign or novate or with a view to negotiating a fresh contract, the buyer and seller will have to consider the timing of the approach very carefully in the light of:

* confidentiality undertakings that have been given; and
* the damage that could be done to the business if news of the proposed sale were to leak out.

The method of any approach to a third party is usually agreed by the seller and buyer before an approach is made. The parties should take care to avoid placing themselves in a disadvantageous negotiating position with the third party. For example, if a deal is announced which is conditional on the buyer renegotiating a new third-party contract, this could give the third party a very strong bargaining position.

In some cases, it will be appropriate to delay contacting the third party until all the other terms of the transaction have been agreed. If a contract is vital to the target business, the seller and buyer may agree to sign the acquisition agreement **but make the satisfactory assignment or novation of the contract or the satisfactory conclusion of a fresh contract with the third party a condition precedent to completion.**

The parties will, subject to any other conditions being satisfied, therefore, be contractually bound to proceed with the transaction **unless** the assignment, novation or negotiation of a fresh contract is not obtained.

**Timing and confidentiality – low value contracts**

For low value, or less important, contracts, the parties may not want to wait to obtain consent to assign or novate these contracts before they go ahead and complete.

Completion is unlikely to be conditional on (and therefore signing and completion will not be split purely because of) assignment or novation of these lower value or less important contracts. On completion of the acquisition such contracts will often still legally remain with the seller and the parties will agree to have them assigned or novated as soon as possible **after** completion.

With the lower value and less important contracts, novation is often effected by conduct. For example, if, after completion, the third party accepts performance by the buyer under the contract and pays for goods or services which the buyer provides, it can often be said that the contract has been novated by the conduct of the buyer and the third party.

**Summary**

* In an asset sale, the buyer is acquiring a collection of assets from the seller rather than acquiring the shares in the seller. The acquisition of assets will require different methods of transfer and therefore more documentation.
* A buyer will acquire third party contracts either through novation; assignment; or the negotiation of a fresh contract. If the contract is important to the business, then the parties may agree to make the assignment or novation of the contract or the signing of a fresh contract with the third party a condition precedent to completion.
* A buyer will often seek to acquire the book debts of the business particularly if the debtors are customers of the business as they buyer will be keen to maintain good relations with them. If the debts arise under contracts that prohibit assignment, then the parties may agree to the buyer collecting the debts as agent for the seller.
* The correct formalities for the transfer of the relevant asset must be complied with e.g., the execution and delivery of a TR1 to the buyer if a property is being transferred.