

by Allan Garro

Following the Rules to Sell a Business Can Save Headaches

It is very common for people to believe that selling a business in Costa Rica is the same as selling a piece of real estate. This, however, is not necessarily true as there might be other, different situations to consider that will change the scenario. A Business may or may be not part of the real estate transaction, meaning sometimes the negotiation is over a property whose owner also owns a business operating on that property, or just about the property, or the business only.

Sometimes the transaction can be easy because normally a business operates under the name of a company structure, like Sociedad Anónima (S.A.), which is similar to what is called a corporation in the United States, or Sociedad Limitada (Ltda) which is a type of limited liability corporation. In those cases the simple way to go is when the Seller endorses the stock of the corporation to the Buyer which becomes the new owner. The next step is to perform changes to the legal representation and appoint a new board of directors and officers.

Acquiring an existing corporation as the way to acquire a piece of real estate or a business is very common practice, but there are some risks involved for the buyer. This is because for lawyers and tax counselors it is easy to check what are called public records. However, there may be other types of documents, like letters of exchange and promissory notes, which might not be on any record. That could mean that later a creditor could appear with a collection based on one of these documents that were signed – and not disclosed – by the former owner/representative.

Therefore, if an existing corporation is to be acquired it is always important to run credit reports on the corporation, the owners, and the members of the board. Also



the Seller should be required to sign a sworn statement declaring that there are no undisclosed documents which might create a future liability for the corporation. Other obligations that need to be checked are taxes, employee social benefit liabilities, and payroll withholding responsibilities. Each one has a different statute of the limitations.

When acquiring the corporation that runs the business is not possible, or the buyer just does not want to take any risks, then is better to set up a new corporation to start fresh and clean. For this it is important to remember that a Business is composed of physical items such as furniture, computers and merchandise, as well as by non-physical things like commercial licenses, intellectual property, clients, and goodwill. It is logical to think that the Buyer will want to keep things that have distinguished the business in the past.

The way to go then is ruled on articles 478 to 489 of the Code of Commerce where rules are contained for the Purchase of Mercantile and Industrial establishments. This is the legal procedure to transfer to a Buyer and new corporation all the physical and non-physical elements of a Business owned by a Seller. To do this the parties need to perform a document in front of a Notary which establishes that the Business and all its elements are being transferred and to disclose the selling price.

Once the document is signed the money is not delivered to the Seller, but is held in escrow by a third party – normally the Notary – until a publication is made in the official Gazette warning potential creditors about the transaction and granting them 15 days to concur and collect their credits from the selling price. Once the term is expired the money is given to the Seller and the transaction is completed, legally assuring that the Seller can make no further claims after that.

On an Interview with the Legal Counselor Jorge Eduardo Ramos Ramos (www.corredoresjurados.com) he stated as follows: “Even strictly following the procedure stated in articles 478 to 489 of the Code of Commerce, buyer must be aware of some specific liabilities that will not be covered by the protection given by the aforementioned law. As a rule of thumb, the legal ownership transfer process stated in the Code of Commerce will protect against non-privileged **private** creditors. Therefore, there are some not covered remarkable exceptions: CCSS (Social Security) and/or any other related institutions liabilities (DESAF, INS, INA,...), Labor related claims/rights and tax liabilities. Those Institutions will simply transfer any outstanding bill or liability from the previous owner to buyers social security account regardless of the com-

pliance of the aforementioned transfer procedure. The same happens with any labor related claims or rights, as Labor Judges have consistently considered the purchase of a business as an unrestricted assumption of former owner’s labor liabilities. The Tax Administration will also pursue any tax related liabilities, regardless of legal transfer of ownership. So every single one of those details need to be double checked before performing any Business transfer. Acquiring a business requires the intervention of an experienced legal/financial team that can perform the necessary Due Diligence”.

Another point to be checked is that on May 20th of this year a new ruling, a new Movable Guaranties Act, which creates a system to grant credits over movable assets like all of those that are contained in a Business, and even over the contracts signed by such Business, goes into effect. This will make it necessary to check that the assets of the business were not given as guaranty before the Business is sold to a new buyer. Fortunately the system will be easy to check by any interested parties.

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