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## The sale and purchase agreement (SPA): what should it contain?

The expected last phase of an M&A process is known as the sale and purchase agreement or SPA. After the entire due diligence procedure, and when a buyer had analyzed the true state of the company for sale, it is finally time to map out the agreement and sale price of the company. Thus, this is the document that will be formalized into a public deed and ultimately presented before a notary, including all of the terms and conditions of the sale.

Most commonly, the buyer, along with their legal advisors, is in charge of preparing the first version of the contract. However, there are exceptions such as the process associated with auctions. In this case, a draft is delivered to the contestants, who will ultimately return the document with their modifications and offers.

A great level of detail and care is required when drafting the contract of sale; a single paragraph in the contract can be the difference between a successful or failed agreement. The ideal scenario at this stage is to have an experienced advisor who has a proven track record in successfully drafting contracts for the sale of companies.

With this in mind, the contract of sale is not a simple document; in fact, it is enormously complex. The most frequent question is: what should be included in the contract? The document integrates an array of assets and liabilities, relationships, existing contracts, etc. In consequence, many entrepreneurs are overwhelmed with the sheer amount of pages contained in the first version of the document. In the article, we are covering the main parts of the contract of a business sale.

### *What is contained in the company sale agreement?*

The contract has five main parts: (1) Description of the transaction; (2) Terms of the agreement; (3) Representations and warranties; (4) Limitations on responsibility; (5) Conditions.

#### 1) Description of the transaction

This stage explains the type of operation, whether it is selling a business or assets. It is very important to describe the real intentions of each one of them, using a direct language, being clear and concise.

In case of a sale of assets, the relevant assets that enter the transaction and the obligations that are transferred should be detailed precisely. Likewise, it will be defined if any property that the seller habitually uses, such as a vehicle, parking space or even their home, is left out of the transaction.

If it is not a sale of assets but a sale of stocks and shares, a section that defines what exactly is being sold is incorporated (for example all the stock or only a specific amount of shares). When there are several companies and shares of companies involved, it is further clarified in detail what is within the perimeter of the transaction.

### 2) Terms of agreement

The first major area that is indicated in the document is the price, along with its corresponding conditions: payment methods, forecast or not of deferred payments, variable payments based on fulfillment of objectives, currency of payment, and circumstances that will produce adjustments in the price (since the final price will be based on the balance at the closing date of the agreement). The contract also includes the information of whether the surplus cash is part of the transaction or is taken by the seller as dividends, although it is not necessary for this particular transaction.

### 3) Representations and warranties

On the one hand, the seller guarantees that the described circumstances of the company are accurate and correct. Some of the events that the seller has to corroborate are the following: the company belongs to the signatories and they have the authority to sell the company; the transaction does not violate any law or other previous contracts; the company holds such as the number of shares, the approval that all the financial statements are correct, all tax payments are updated, that the company has not suffered any substantial change in its performance since the due diligence (distribution of dividends, raised salaries or newly signed contracts that could harm the buyer); copies of the bylaws are delivered to the buyer; and the company patents and trademarks are in place.

In the event of inaccuracy, incorrectness or untruthful information, the buyer of the company can be compensated for the caused damage, a contingency or a loss. For this purpose, liability warranty clauses are established. Besides, retention of part of the price or the deposit of that portion is usually introduced in a bank account called an escrow account. In other cases, a simple bank guarantee is agreed upon.

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On the other hand, the company's contingencies that are already included in the price are described so that (once the buyer knows these contingencies before paying the price) the seller is exonerated with respect to the damages or claims that these contingencies may cause to the buyer. In many cases, a price is put on these contingencies.

When the operation is based on the pre-closing balance sheet and the data will be adjusted after closing, the representations and warranties will most likely cover the interim period between the two balance sheets.

#### 4) Limitations on Responsibility

Usually, there are limitations to the seller's responsibility regarding responsibility with the Treasury, Social Security, or Third Parties. There are also time limits on liability claims, except for the cases of tax, labour, social security or administrative contingencies, where the time limit coincides with the legal prescription.

The contract usually sets a minimum amount of responsibility above which the seller's liability can be discussed, so that the parties eliminate the possibility of any minor issues. For each transaction, depending on the size, the amount will be that in which the parties feel comfortable in structuring the agreement.

#### 5) Conditions

The conditions include, among others, non-compete clauses. These clauses serve to prevent the seller from setting up a parallel company and taking customers away from you. It serves to protect the company's goodwill.

Sometimes a contract of sale is signed conditioning the closing to the fulfillment of certain milestones such as obtaining authorisations, assignment of contracts or that the seller carries out certain operations in advance (the sale of a plot of land or its appropriate legalisation in the corresponding register).

#### 6) Annexes

The annexes are a part of the contract that has a legal value. They include due diligence, financial statements, patents, certificates of compliance with Social Security, Treasury, etc.

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