

**A SUGGESTED SYNTHESIS OF RULINGS ON THE
STOCKHOLDERS' APPROVAL REQUIREMENT
AS A CONDITION PRECEDENT TO A SALE OF ALL OR
SUBSTANTIALLY ALL ASSETS OF A CORPORATION***

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ABSTRACT

In negotiations for transactions involving corporate restructuring, spin-offs, mergers, and acquisitions, among others, it is common to encounter transferring of assets from entity to another, which may or may not involve critical assets of entities that are necessary for it to continue business. Given the requirements under Section 39 of the Revised Corporation Code in cases where there is a sale of all or substantially all of the corporation's properties and assets, this paper explores the application of the concept "all or substantially all" and attempts to synthesize these rules to create a working framework.

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The views of the Author as presented here are his alone.

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“We look to the language of the document itself in our search for its meaning. We do not of course stop there, but that is where we begin.”

— Justice Enrique Fernando¹

I. INTRODUCTION

Envision this *hypothetical* scenario: there are two domestic corporations, the first (“Corporation A”) is engaged in shipping and the second (“Corporation B”) engaged in servicing cargo vessels. Around one-third (1/3) of the assets of Corporation A consists of cargo vessels that it owns and to maintain this fleet, Corporation A engages Corporation B to service these vessels. Despite its stable position in the industry, Corporation B has always sought to expand its business by entering the shipping industry, but it has not been able to set aside capital to purchase and build a fleet on its own.

Corporation B is profitable, year in, year out, given that it has a near monopoly in the business of servicing cargo vessels. On the other hand, although Corporation A is an institutional player in the shipping arena, it has endured continuous business losses for consecutive years.

¹ *J.M. Tuason & Co, Inc. vs. Land Tenure Admin., G.R. No. 21064, 31 SCRA 413, 422, Feb. 18, 1970.*

Given Corporation A's predicament, and sensing an opportunity to break into the shipping industry, Corporation B proposed to acquire Corporation A's cargo vessel fleet, in exchange for common shares in Corporation B. After Corporation B acquires the cargo vessel fleet, the shipping and servicing businesses will be consolidated—both the shipping and servicing business will now be owned by Corporation B. After the acquisition, Corporation A and Corporation B will then enter into an operations agreement whereby Corporation A will stay on to assist Corporation B in the operation of the cargo vessels fleet, given the former's expertise and experience in the shipping industry.

On Corporation A's end, it can now avail of all the benefits as Corporation B's stockholder, while cutting its losses since the ownership and operation of the cargo vessels will be principally managed by, and will be the responsibility of, Corporation B.

To implement this transaction, Corporation A would transfer ownership of all of its cargo vessels to Corporation B, in exchange for the issuance of common shares of Corporation B, i.e., a property-for-share swap.² Under a property-for-share swap in this example, assets other than

² See REV. CORP. CODE, § 61(b) (2018). Section 61(b) of the Revised Corporation Code provides that:

Section 61. Consideration for Stocks. - Stocks shall not be issued for a consideration less than the par or issued price thereof. Consideration for the issuance of stock may be property, tangible or intangible, provided that the following requisites occur:

- (a) The property is *actually received* by the corporation;
- (b) It is *actually necessary or convenient* for its use and lawful purposes;
- (c) It must be subject to a *fair valuation* equal to the par or issued value of the stocks issued;
- (d) The valuation shall be *initially determined by the stockholders or board of directors*; and
- (e) The valuation is subject to the *approval* of the Commission.

See also Sec. Exch. Comm'n Off. of Gen. Couns. (SEC-OGC) Op. No. 24-15 (June 6, 2024). Re: Corporate Restructuring of a Domestic Corporation; Rice and Corn Industry; and Property Swap. In an SEC Opinion by the Office of the General Counsel, with regard to property swap for stocks, the SEC held that:

Whenever a property or an interest therein is used as consideration for the issuance of shares of stock, the said property or interest should be free from any right of redemption or pre-emption of the other co-owners considering that the transfer to the corporation must be in such a manner that the property or an interest therein is capable of being applied to the payment of the corporation's debts or can be subject to levy and sale on

cash (i.e., the cargo vessels), are swapped (i.e., used as consideration), for the issuance of stocks in another corporation (i.e., the issuance of Corporation B of common shares to Corporation A in exchange for the cargo vessels conveyed to Corporation B). Corporation A becomes a stockholder of Corporation B, while Corporation B is able to own and operate the cargo vessel fleet and finally access the shipping.

After further negotiations and the conduct of an independent third-party valuation of the cargo vessels, the parties agree that under the resulting corporate structure, Corporation A will be entitled to up to a 20% stake in Corporation B. This is given the value of the cargo vessels that Corporation A will convey to Corporation B, as consideration for those common shares that Corporation B will issue in Corporation A's name.

Towards the end of the negotiation stage, in determining the conditions that Corporation A has to comply with before the deal is closed, you were engaged by Corporation A as their counsel. One of the remaining unresolved issues that may potentially become a deal-breaker is whether stockholder approval is required for Corporation A to convey the cargo vessels to Corporation B—a key step to the entire transaction. Although it appears to be a straightforward scenario, you want to cover all the bases and implications before presenting your position during negotiations.

Although this is a purely hypothetical situation, more often than not, similar scenarios have occurred during negotiations for many major transactions in the Philippine market. It is common to have clients approach you as their external counsel—clients who have been presented opportunities to stop their losses in the industries where they do business in, but are unsure as to the corporate approvals required. There are also those clients who are keen on knowing if stockholder approval is indeed required, especially for those who are in the midst of a brewing intra-corporate dispute among the stockholders (for instance, closed corporations run by family members who are not on good terms), such that the two-thirds (2/3) requirement may be a struggle to reach. External auditors engaged by these corporations would also necessarily check whether the sale of such assets is supported by the appropriate approval and documentation.

These are real-life problems that reflect the real-life concerns of clients that lawyers deal with every day. To understand how to navigate such

execution for the satisfaction of any judgment or decree against the corporation.

concerns, it is necessary to review relevant legal basis of what the transaction requires—whether stockholder approval is indeed needed to convey corporate assets. That review, however, reveals an ambiguity about what precisely triggers the stockholder-approval requirement.

II. LEGAL FRAMEWORK

A. Revised Corporation Code

Section 39 of the Revised Corporation Code (“RCC”) provides the following:

SECTION 39. Sale or Other Disposition of Assets. – Subject to the provisions of Republic Act No. 10667, otherwise known as “Philippine Competition Act”, and other related laws, a corporation may, by a majority vote of its board of directors or trustees, sell, lease, exchange, mortgage, pledge, or otherwise dispose of its property and assets, upon such terms and conditions and for such consideration, which may be money, stocks, bonds, or other instruments for the payment of money or other property or consideration, as its board of directors or trustees may deem expedient.

A sale of all or substantially all of the corporation’s properties and assets, including its goodwill, must be authorized by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or at least two-thirds (2/3) of the members, in a stockholders’ or members’ meeting duly called for the purpose.

In nonstock corporations where there are no members with voting rights, the vote of at least a majority of the trustees in office will be sufficient authorization for the corporation to enter into any transaction authorized by this section.

The determination of whether or not the sale involves all or substantially all of the corporation’s properties and assets must be computed based on its net asset value, as shown in its latest financial statements. A sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.

Written notice of the proposed action and of the time and place for the meeting shall be addressed to stockholders or members at

their places of residence as shown in the books of the corporation and deposited to the addressee in the post office with postage prepaid, served personally, or when allowed by the bylaws or done with the consent of the stockholder, sent electronically: *Provided*, That any dissenting stockholder may exercise the right of appraisal under the conditions provided in this Code.

After such authorization or approval by the stockholders or members, the board of directors or trustees may, nevertheless, in its discretion, abandon such sale, lease, exchange, mortgage, pledge, or other disposition of property and assets, subject to the rights of third parties under any contract relating thereto, without further action or approval by the stockholders or members.

*Nothing in this section is intended to restrict the power of any corporation, without the authorization by the stockholders or members, to sell, lease, exchange, mortgage, pledge, or otherwise dispose of any of its property and assets if the same is necessary in the usual and regular course of business of the corporation or if the proceeds of the sale or other disposition of such property and assets shall be appropriated for the conduct of its remaining business.*³

Section 39 leaves room to interpret the concept “substantially all.” On the one hand, the immediate, knee-jerk position would be that “substantially all” means a majority of the corporate assets of any corporation, given that there is a quantitative basis, i.e., “[t]he determination of whether or not the sale involves all or substantially all of the corporation’s properties and assets must be computed based on its net asset value, as shown in its latest financial statements.” On the other hand, the fourth paragraph of the same Section includes a caveat that becomes a qualitative requirement—the sale shall be deemed to cover substantially all the assets only “if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.” Thus, theoretically, a corporation that disposes only 30% of its assets—but with such assets being necessary and indispensable for the conduct of its business—would still need to comply with the requirement under Section 39 of the RCC.

From the foregoing, there appear to be two general views.

³ REV. CORP. CODE (2018), § 39. (Emphasis supplied.)

B. First View: Nature of the Assets in Relation to the Primary Purpose of the Corporation

In determining whether a sale consists of a disposition of all or substantially all of the corporation's assets that requires the application of Section 39 of the RCC, the Supreme Court in *Y-I Leisure Philippines, Inc. v. Yu*⁴ stated that "the litmus test to determine the applicability of Section [39] would be the capacity of the corporation to continue its business after the sale of all or substantially all its assets."⁵ The Court also stressed that Section 39 of the RCC "does not contemplate an ordinary sale of all corporate assets; the transfer must be of such degree that the transferor corporation is rendered incapable of continuing its business or its corporate purpose."⁶ This view has been relied upon by the following opinions issued by the Securities and Exchange Commission (SEC):

*1. SEC Opinion addressed to Dr. Raul D. Jara M.D.*⁷

In this opinion, the SEC was requested to provide the general requirements governing the sale of a corporation's property. In interpreting Section 40 of Batas Pambansa Bilang 68 (the "Old Corporation Code"),⁸ SEC stated that "if after the disposition of corporate assets, the disposing corporation can still continue the business for which it was organized, the disposition can be made without complying with the requirements set forth in Section 40 as it is not covered by said section."⁹

Here, the SEC did not attach a numerical threshold. Instead, it defined the concept "sale or disposition of all or substantially all of the assets" as one which will render the corporation incapable of continuing the business or accomplishing the purpose for which it was incorporated.¹⁰ There is a legal basis for this, based on Section 39, paragraph 4 of the RCC.¹¹

⁴ [Hereinafter "*Y-I Leisure Phils., Inc.*"] G.R. No. 207161, 770 SCRA 56, Sept. 8, 2015.

⁵ *Id.* at 76.

⁶ *Id.* at 75.

⁷ Sec. Exch. Comm'n Op. [hereinafter "SEC Op. re: Dr. Jara"] (Dec. 4, 1990). SEC Opinion signed by Associate Commissioner Rodolfo L. Samarista addressed to Dr. Raul D. Jara, M.D.

⁸ Now Section 39 of the RCC.

⁹ SEC Op. re: Dr. Jara.

¹⁰ *Id.*

¹¹ Section 39, paragraph 4 of the RCC provides, in part, that "[a] sale or other disposition shall be deemed to cover substantially all the corporate property and assets if

Simply, even if a corporation sells, say, 80% of its assets, if it retains the assets that are necessary to continue its business, it need not secure the approval of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock.

2. *SEC Opinion addressed to Attys. Rose Marie M. King, et al.*¹²

This opinion proceeds from a factual scenario involving two corporations (Corporation 1 and Corporation 2). Here, Corporation 1 is a holding company that owned shares in two other corporations. The transaction involved the following steps: (i) Corporation 1 will transfer ownership of these shares in the two corporations to Corporation 2; and (ii) Corporation 2 will then issue new shares to Corporation 1 in exchange for the shares transferred.

The SEC was then requested to clarify if the approval of Corporation 1's stockholders, representing at least two-thirds (2/3) of the outstanding capital stock is required, given that: (i) These shares are not all or substantially all of the shares owned by Corporation 1 as a holding company by nature; and (ii) This transaction is within the primary purpose of Corporation 1, since Corporation 1 is a holding company by nature, i.e., one that acquires and sells shares of other corporations as part of its business.

The SEC, citing four prior opinions, reiterated that in interpreting former Section 40 of the Old Corporation Code, it focuses not on the number or volume of assets transferred but on the transfer's effect on the corporation's business.¹³ "To determine if the sale is made in the ordinary course of business, the *test is not the amount involved but the nature of the transaction.*"¹⁴ Inversely, the SEC added that "a transfer, even if involving all or substantially all of a corporation's assets, would not require stockholders' approval if the transfer is necessary in the usual and regular course of business of the corporation or if the proceeds of the sale will be

thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated."

¹² SEC Op. [hereinafter "SEC Opinion re: Attys. Rose Marie M. King"] (Oct. 21, 2002). SEC Opinion signed by Chairperson Lilia R. Bautista addressed to Attys. Rose Marie M. King, Maria Teresa D. Mercado-Ferrer, and Jose M. Layug, Jr.

¹³ *Id.*

¹⁴ *Id.*

appropriated for the conduct of the corporation's business.”¹⁵ Citing another SEC opinion dated August 21, 1995, “if the sale thereof will not render the corporation incapable of continuing its business or if the disposition is necessary in the usual and regular course of business, the board of directors as it may deem expedient and in good faith, dispose the same without the approval of [the] stockholders.”¹⁶

*c. SEC OGC Opinion No. 19-01*¹⁷

In this opinion, a corporation providing cable TV services (“Cable TV Corporation”) intended to assign all the assets of one of its five branches to a single proprietorship. According to the SEC, “if the property to be sold constitutes merely a part of the assets and the sale thereof will not render the corporation incapable of continuing its business or if the disposition is necessary in the usual and regular course of business, the Board of Directors as it may deem expedient and in good faith, may dispose the same without the approval of the stockholders.”¹⁸

Since the Cable TV Corporation would still have four remaining branches, it would not be incapable of continuing its business or accomplishing the purpose for which it was incorporated, and the proposed assignment can be made by a mere majority vote of the Board of Directors.¹⁹

The SEC in this opinion also emphasized this clause in Section 40 of the Old Corporation Code, which is also in Section 39 of the RCC:

Nothing in this section is intended to restrict the power of any corporation, without the authorization by the stockholders or members, to sell, lease, exchange, mortgage, pledge or otherwise dispose of any of its property and assets if the same is necessary in the usual and regular course of business of said corporation or if the proceeds of the sale or other disposition of such property and assets be appropriated for the conduct of its remaining business.²⁰

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ SEC-OGC Op. No. 19-01 (Jan. 31, 2019).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

In this opinion, the SEC was of the view that stockholder approval is not required if the selling, leasing, exchanging, mortgaging, pledging or otherwise disposing its assets would be (i) necessary in the usual and regular course of business of said corporation or (ii) if the proceeds of the sale would be appropriated for the remaining business of the corporation involved.

If the principles discussed above are applied to the hypothetical scenario in the beginning, even if the cargo vessels only constitute one-third (1/3) of Corporation A's total assets the sale of the same for Corporation B's shares would classify as a sale of substantially all of the assets of Corporation A since these are the assets which are necessary for the corporation to continue its business as a shipping company. If the test is how the transaction would affect *the corporation's business and not the volume or amount of assets involved*, clearly the sale of cargo vessels of a shipping company will prevent it from pursuing its primary purpose.

At this point, it is worth noting that the SEC opinions cited were issued under the Old Corporation Code, which governed Philippine corporations for almost four decades. *These opinions remain relevant and instructive, however, because Section 39 of the RCC preserves the same textual basis for the first view*, as shown by the comparison of the relevant clauses in both Codes:

Old Corporation Code	Revised Corporation Code
<p data-bbox="203 1065 513 1097">Section 40, paragraph 2.</p> <p data-bbox="203 1134 625 1341"><i>A sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.</i></p>	<p data-bbox="644 1065 954 1097">Section 39, paragraph 4.</p> <p data-bbox="644 1134 1065 1566"><i>The determination of whether or not the sale involves all or substantially all of the corporation's properties and assets must be computed based on its net asset value, as shown in its latest financial statements. A sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.</i></p>

Thus, these SEC opinions, unless superseded by subsequent and contrary opinions, still serve as instructive guidance on how to interpret Section 39 of the RCC.

C. Second View – 51% Threshold

On the other hand, while Section 39, paragraph 4 of the RCC substantially copies Section 40, paragraph 2 of the Old Corporation Code, the first sentence of the clause below was added from the previous phraseology in the Old Corporation Code:

The determination of whether or not the sale involves all or substantially all of the corporation's properties and assets must be computed based on its net asset value, as shown in its latest financial statements. A sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.²¹

The emphasized phrase “assets must be computed based on its net asset value, as shown in its latest financial statements” then implies a numerical threshold on what constitutes “all or substantially all.”

In line with this, the SEC issued Memorandum Circular No. 12, series of 2020, dated April 7, 2020, which provides two important rules:

- (i) The sale or disposal of corporate property amounting to at least 51% of the corporation's total assets shall be considered a sale of all or substantially all of the corporation's assets which requires the approval of stockholders;²² and
- (ii) The determination of whether or not the sale amounts to at least 51% of the corporation's assets must be computed based on its total assets as shown in its latest audited financial statements, provided that the computation may also be based on the latest quarterly financial statement or a special

²¹ REV. CORP. CODE, § 39, ¶ 4.

²² SEC Mem. Circ. No. 12, ser. of 2020 [hereinafter “SEC Memo re: Shareholders' Approval on Sale”] (April 7, 2020). SEC Memo to Publicly-Listed Companies on Shareholders' Approval on Sale of Corporate Assets.

purpose financial statement prepared in connection with the execution of the transaction.²³

While this particular memorandum circular is addressed to publicly-listed companies, it remains instructive with respect to determining what numerical threshold is applicable when applying Section 39, paragraph 4 of the RCC.

Theoretically, given this standard, the nature of the assets is not considered to a certain extent. What is material is whether assets disposed amount to at least 51% of the corporation's assets, based on its total assets indicated in its financial statements.

To date, there is no Supreme Court decision nor SEC Opinion that provides a definitive reconciliation of the principles discussed above. The fact that these two views are textually provided in the same paragraph of the same section in the RCC seems to only complicate this. The first sentence seems to imply that "all or substantially all" must be *computed* based on the corporation's financial statements. Meanwhile, the second sentence seems to say that *regardless* of your computation, if the sale of such assets would render a corporation incapable of continuing the business or accomplishing the purpose for which it was incorporated, then that sale would be deemed a sale of all or substantially all of a corporation's assets.

D. Consequences of Non-Compliances with the Mandatory Stockholders' Approval Requirement

Regardless of the view, if stockholder approval is determined to be required under the given circumstances, and such requirement is not complied with, SEC may intervene *motu proprio* or upon the institution of a complaint by an interested stockholder. The SEC may do any of the following:

First, issue a cease-and-desist order and refer the issue for prosecution to the Department of Justice. Under Section 156 of the RCC, when the SEC has reasonable basis to believe that a person has violated, or is about to violate the RCC, or any of the rules or regulations of the SEC, it may direct such person to desist from committing the act constituting the violation.²⁴ This may be done by the SEC *ex parte* to enjoin an act or practice

²³ *Id.*

²⁴ REV. CORP. CODE, § 156.

which is fraudulent or can be reasonably expected to cause significant, imminent, and irreparable danger or injury to public safety or welfare. The *ex parte* order shall be valid for a maximum period of 20 days, without prejudice to the order being made permanent after due notice and hearing.²⁵ Thereafter, the SEC may proceed administratively against such person²⁶ and/or transmit evidence to the Department of Justice for preliminary investigation or criminal prosecution and/or initiate criminal prosecution for any violation of the RCC, or any of the rules or regulations of the SEC.²⁷

Second, the SEC may impose an administrative sanction. Under Section 158 of the RCC, if after due notice and hearing, the SEC finds that any provision of the RCC, rules or regulations of the SEC, or any of the SEC's orders have been violated, the SEC may impose any or all of the following sanctions, taking into consideration the extent of participation, nature, effects, frequency and seriousness of the violation:

- a) Imposition of a fine ranging from Five Thousand Pesos (Php5,000.00) to Two Million Pesos (Php2,000,000.00), and not more than One Thousand Pesos (Php1,000.00) for each day of continuing violation but in no case to exceed Two Million Pesos (Php2,000,000.00);
- b) Issuance of a permanent cease and desist order;
- c) Suspension or revocation of the certificate of incorporation; and
- d) Dissolution of the corporation and forfeiture of its assets under the conditions in Title XIV of this Code.²⁸

As mentioned above, the SEC does not need to wait for a complaint from an interested stockholder to initiate any of the foregoing. It can initiate an investigation, issue the cease-and-desist order *ex parte*, and thereafter impose any of the sanctions under Section 158 of the RCC.

²⁵ § 156.

²⁶ § 158.

²⁷ § 156.

²⁸ § 158.

E. Synthesis

Now, imagine you are back in that conference room, negotiating on Corporation A's behalf. You know that Corporation A needs this transaction closed as soon as possible to stop the bleeding that it has endured—year-in, year-out. At the same time, you know that compliance with the RCC is important to ensure that there is minimized risk of the transaction being challenged.

To add to the growing list of complications, there is also a minority group of stockholders in Corporation A, hell-bent on finding any flaw in the transaction with Corporation B that will allow them to challenge it. The counsels of Corporation B are also pushing you—short of strong-arming—to remove stockholder approval as a condition to closing since the cargo vessels only constitute 33% of Corporation A's assets based on its latest financial statements. They also remind you that the patience of the stockholders of Corporation B is limited.

You are also aware that the SEC may inquire into the transaction's validity, upon its own initiative or of any of the disgruntled stockholders files an initiatory complaint with the SEC. This may endanger the closing of the transaction.

How will you navigate this situation with all these competing circumstances?

The following guidelines derived from Section 39 of the RCC and the various SEC issuances discussed above may help:

First, if it has been determined that the assets to be sold, leased, exchanged, mortgaged, pledged or otherwise disposed amount to at least 51% of the corporation's assets (based on its total assets as shown in its latest audited financial statements), a prudent course of action would be to require two-thirds (2/3) stockholders' approval first. Even if you have not determined if the assets are crucial to the corporation's business, this course of action is based on a quantifiable interpretation of "all or substantially all," coming from SEC Memorandum Circular No. 12, series of 2020. Tangential to this, if you are advising a publicly listed corporation, note that SEC Memorandum Circular No. 12, series of 2020 is specifically addressed to publicly listed corporations, hence stockholder approval would be needed under this rule once the 51% threshold is breached, whether or not the sale "accrued in a single transaction or in several transactions taking place within

one (1) year from the date of the first transaction (aggregate sale transaction).”²⁹

Second, if it has been determined that the assets to be sold, leased, exchanged, mortgaged, pledged or otherwise disposed are necessary for the conduct of the corporation’s business, such that the disposition renders the corporation incapable of continuing the business or accomplishing the purpose for which it was incorporated, two-thirds (2/3) stockholders’ approval is required, *regardless* of the volume of the assets. This is because what triggers the stockholder approval requirement is the fact that these assets for disposition are essential for the corporation to continue as a going concern. Note that in Section 39, paragraph 4 of the RCC, the provision’s phraseology is such that a sale or other disposition *shall be deemed* to cover substantially all the corporate property and assets if the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.

Third, if you are not sure how the sale of the assets would impact the corporation’s operations in accordance with its primary purpose, given the multiple aspects of the corporation’s operations, then it would be advisable to just secure two-thirds stockholders’ approval.

Fourth, if the assets to be sold, leased, exchanged, mortgaged, pledged or otherwise disposed are:

- (i) Not necessary to the business or accomplishing the purpose of the corporation;
- (ii) Consist of at least 51% of the corporation’s assets (based on its total assets as shown in its latest audited financial statements); but
- (iii) The disposition its asserts would be (a) necessary in the usual and regular course of business of said corporation or (b) the proceeds of the sale would be appropriated for the remaining business of the corporation involved.

then, under the conditions mentioned above, it is reasonable to take the view that stockholders’ approval may not be required. The Court in *Y-I Leisure Philippines, Inc.* stated the following:

²⁹ SEC Memo re: Shareholders’ Approval on Sale.

It must be clarified, however, that not every transfer of the entire corporate assets would qualify under Section 40. It does not apply (1) if the sale of the entire property and assets is necessary in the usual and regular course of business of corporation, or (2) if the proceeds of the sale or other disposition of such property and assets will be appropriated for the conduct of its remaining business.³⁰

These guidelines are not immutable. Whether Section 39 of the RCC is triggered depends on the circumstances surrounding each transaction. When dealing with actual clients and actual transactions, legal requirements and limitations are not the only considerations. In some transactions, time is usually an issue, where potential investors willing to acquire your assets cannot wait for the conduct of a stockholders' meeting before closing the deal. For other transactions, the fractious relationships among competing stockholders is an issue, such that the majority group in control cannot muster two-thirds support to get a deal through, even if the deal is helpful for the corporation's overall fiscal health. Yet, if two-thirds stockholders' approval is made as a closing condition before the sale of assets pushes through, this would clearly be a deal-breaker. There are also some corporations whose businesses are very complicated and multi-faceted, such that determining the importance of its assets is difficult to ascertain from an operational and commercial point of view.

Thus, what is most important is for one to be ready to address the legal requirements and complications that may arise in negotiations, and to justify one's position when negotiating as counsel for one's client with the appropriate legal basis as support, without losing sight of the specific circumstances that apply to one's client. At the end of the day, the goal is to close the transaction for the ultimate benefit of all the stakeholders concerned.

III. CONCLUSION

In the greater scheme of things, securing stockholders' approval under Section 39 of the RCC would probably be only one of the many considerations that counsels would have to think of when identifying a deal's closing conditions. Other factors, such as those commercial or operational

³⁰ *Y-I Leisure Phils., Inc.*, 770 SCRA 56, 76.

in nature, will inevitably arise alongside legal complications such as determining the need for stockholders' approval.

Ultimately, as counsel, what matters most is: grasping the applicable laws and the SEC's interpretations; understanding the risks associated with each possible course of action that your client may take; and explaining the deal's facets, premises and consequences in a manner that enables stakeholders to reach the best possible decision under the circumstances.

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