International M&A and Joint Ventures Committee Newsletter

October 9, 2013

Editor's Note:

Welcome to a very full edition of our Committee's newsletter. We have "country updates" spanning the globe from 15 jurisdictions. In the next edition we are going to take a break from country updates and look to do a theme edition (scheduled for December). We will pick one theme (for example, foreign takeover rules, shareholder activism developments, etc.) and seek contributions from Committee members on that topic from all the jurisdictions represented on our Committee. The topic has not been chosen yet, so please feel free to reach out to me to suggest topics. The announcement of the topic and a call for submissions will be made in mid-November.

For those of you attending the Section of International Law Fall Meeting in London, England we have set out below a number of social events and substantive programs that will be of interest to our Committee members – you are encouraged to attend as many as possible.

Tuesday, October 15, 2013
Social Event with the Europe Committee

Martini, Shaken not Stirred evening at Dukes Hotel, a short cab ride from the House of Lords opening reception. Drinks at Dukes Bar is something of an occasion. Frequented by James Bond author Ian Fleming, the bar is said to have been the inspiration for James's Bond classic martini order. Starts at 8:30pm, Canapes will also be served. RSVP to pat.english@matheson.com

Wednesday, October 16, 2013
Committee Dinner

The dinner will be held on Wednesday, October 16, 2013 at 9:30pm at Lutyens restaurant which is close to the reception at Middle Temple. Dinner will be GBP 100 per person and will include wine, bottled water, soft drinks and a three course meal. Reservations are on a first come first serve basis. Contact nicola.weston@slaughterandmay.com.

Thursday, October 17, 2013
Committee Meeting
10:30 a.m. – 11:30 p.m.
Marlborough Suite

We will be having a meeting of all committee members to discuss committee activities for the upcoming year, and, if time permits, to receive an update on developments in certain jurisdictions.

Friday, October 18, 2013
Committee Breakfast/New Member Welcome Session
8:00 a.m. – 9:00 a.m.
Marlborough Suite (Please bring your breakfast from downstairs to the room)

IN THIS ISSUE

Country Updates

COUNTRY UPDATE ON ARGENTINA

Ambitious Call for Unconventional Oil & Gas JV Partners in Argentina Scores First Two

By Mariana Ardizzone, Partner, Maciel, Norman & Asociados, Argentina (mardizzone@mna.com.ar)

After the expropriation of the 51% equity of YPF SA. from Spanish multinational Repsol enacted by the Argentine National Congress on May 3, 2012[1], YPF faced the enormous challenge of reverting Argentina's energy deficit.

Indeed, domestic oil and gas reserves and production had been in steep decline for a long time to the point of losing self-sufficiency. In 2012, Argentina imported different forms of energy at a cost of approximately US$ 9.5 billion per year and said cost is estimated to rise to USD14 billion this 2013[2].

The dimensions of the problem lead the new YPF management to focus on attracting foreign investors to partner with YPF in Joint Ventures to develop the huge unconventional oil and gas discoveries announced by YPF on November 7, 2011[3], and May 10, 2011[4]. At approximately the same time, the U.S. Energy Information Administration ranked Argentina 3rd in the world, after China and the United States, in the size of its Technically Recoverable Shale Gas Resources[5].

The setting is extremely unfavorable to such an ambitious goal and included an unstable rule of law environment, over 10 years of heavy government intervention in the energy business, severe foreign exchange controls, and a fresh expropriation for which no compensation has yet been paid.

Yet, the Argentine Executive Power designed and put in place a new set of incentives under National Executive Decree 929/2013 gazetted last July 15, 2013[6] at the instances of prospective investors solicited by the Argentine Government.

Incentives are available only to companies who submit to the Argentine Government a "Hydrocarbons Exploitation Investment Project" involving the performance of direct investment in foreign currency of no less than USD 1billion calculated at the time of submission of the project and to be invested during the first five (5) years of the project timeline[7].

Incentives provided under the Decree are only effective as from the 5th year of project implementation and include: (a) At times when the domestic market is fully satisfied, the right to export freely 20% of the hydrocarbons production from such projects without any export duty, coupled with a right to freely dispose of all foreign currency proceeds obtained therefrom[8] and (b) At times when national hydrocarbon production is insufficient to meet the domestic demand, the right to receive for 20% of the hydrocarbons production from such projects a price in Argentine Pesos not lower than the reference export price (before export duties) coupled with access to the foreign exchange market to convert the said proceeds to foreign currency.

National Executive Decree 929/2013 paved the way for YPF SA and Chevron Corporation entering into a JV agreement the following day to develop shale oil and gas resources from the Vaca Muerta formation located in the Neuquén province.

The agreement calls for initial outlays of approximately $1.24 billion to enable the first phase of development in the Loma La Lata Norte and Loma Campana areas. The initial program will include the drilling of 100 wells in a 5,000-acre tract, part of a 96,000-acre concession[9].

A few months after that, YPF SA scored its second ambitious prospective JV, this time signing an agreement with a local subsidiary of Dow Chemical aimed at developing shale gas plays in El Orejano area.

The agreement contemplates an expenditure by both parties of up to USD 188 million which will be directed towards the joint exploitation of an unconventional gas pilot project in the Province of Neuquén, of which Dow will provide up to USD 120 million by means of a convertible financing of a participation in the project, which contemplates a first phase of work during which 16 wells will be drilled.

If Dow exercises the conversion option, YPF would contribute 50% of its participation in El Orejano area and a 50% equity interest in a joint venture to be formed for the exploitation of this area. If Dow does not exercise the option, the parties have agreed to conditions whereby the financing would be repaid, over a term of five years[10].

The YPF management has already called publicly for many more agreements like these to be signed and is already after new ambitious milestones. The energy deficit though is still far from being reverted.

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1. Hydrocarbons Sovereignty Act Nº26,741 available at http://infoleg.mecon.gov.ar/infolegInternet/anexos/195000-199999/196894/norma.htm
2. See, e.g Se acelera la salida de divisas por el aumento de 47,5% en las importaciones de energía [Foreign Currency Outflows Accelerate due to 47.5% increase in energy imports], La Nación, July 22, 2013, http://www.lanacion.com.ar/1603142-se-acelera-la-salida-de-divisas-por-el-aumento-de-475-en-las-importaciones-de-energia?utm_source=n_tip_nota2&utm_medium=titularP&utm_campaign=NLEco
3. Form 6-K – YPF Sociedad Anónima, available at http://www.ypf.com/enu/InversoresAccionistas/Relevant%20Facts/11-07-2011%20Update%20on%20non%20conventional%20resources.pdf
4. Form 6-K – YPF Sociedad Anónima, available at http://www.ypf.com/enu/InversoresAccionistas/Relevant%20Facts/05-11-2011%20New%20Non%20conventional%20crude%20oil%20discovery%20coming%20from%20Shale%20oil.pdf
5. World Shale Gas Resources:An Initial Assessment of 14 Regions Outside the United States, April 2011, available at http://www.eia.gov/analysis/studies/worldshalegas/
6. Decree 929/2013 available at http://www.infoleg.gob.ar/infolegInternet/anexos/215000-219999/217314/norma.htm
7. *See id*. Section 3
8. *See id*, Section 6
9. See e.g Press Release from Chevron Corporation dated July 16, 2013 Available at http://www.chevron.com/chevron/pressreleases/article/07162013_chevronargentinasypfsignaccordtodevelopvacamuertashale.news and Press Release from
10. See Form 6K, YPF S.A. filed September 24, 2013 available at http://www.ypf.com/enu/InversoresAccionistas/Relevant%20Facts/24-09-2013%20SEC%20HR%20Agreement%20for%20the%20development%20of%20unconventional%20gas.pdf

COUNTRY UPDATE ON BELGIUM

Revision of Continuity of Enterprises Act in Belgium

By Katrien Vorlat, Partner, Stibbe Brussels, Brussels, Belgium (katrien.vorlat@stibbe.com)

The Continuity of Enterprises Act of January 31, 2009 (the "Act") regulates the procedure for reorganization of companies in difficulty ("judicial reorganization"). This procedure allows companies in financial difficulty to be granted temporary stay of enforcement from creditors' claims so that they can continue their activities using this temporary protection measure. The Act takes an "open portal" approach, meaning that the thresholds for the judicial reorganization procedure are low. Moreover, the debtor also has a choice of several methods to maintain the company as a going concern. The Belgian judicial reorganization procedure can generally be described as follows:

1. a court-supervised amicable agreement between the debtor and its creditors
2. a collective reorganization plan to be approved by both the creditors and the Court

3. a court-supervised transfer of undertaking of the company's business through a sale of all or part of the assets, conducted by the court-appointed receiver
4. an amicable out-of-court settlement between the company and at least two of its creditors. The disadvantage of this last option is that there is no stay of enforcement

Since the entry in to force of the Act, a large number of judicial reorganizations have ended in bankruptcy, due to certain loopholes in the law or inappropriate use. The Belgian legislator reacted by adopting the Act of May 27, 2013 (the "Reparation Act") amending certain provisions. On August 1, 2013 these amendments entered into force. This Reparation Act does not modify the fundamental principles; the continuity and development of a company in difficulty remain the prevailing objectives of the Act. Instead, the legislator aims to ensure that companies are more effectively protected as a going concern in the short- or long-term and that creditor difficulty related issues are also detected. The Reparation Act also increased the thresholds so that abuse of the reorganization procedure could be reduced. Finally, the amendments reinforce uniformity and transparency of the procedure.

Preventing companies from being in financial difficulty and detecting those that are

The Reparation Act confers more power to external accountants, auditors, and tax consultants. The latter have a duty to inform the company's directors if the continuity of the company is being jeopardized. If the directors fail to implement a plan to ensure the continuity of the company for a period of twelve months, the company's financial advisors may notify the President of the Commercial Court. If necessary, the Court can review the recommendations of the financial advisors and take any measures that should be made by the debtor.

Anti-abuse provisions

The Reparation Act introduces several anti-abuse provisions. For example, the previously low thresholds are now increased to reduce potential abuse of the judicial reorganization procedure. Companies in financial difficulties must now file all supporting documents simultaneously with their initial request, including (but not limited to) accounting records that are not more than three months old, as well as a budget with estimated income and expenses. This information must be prepared with the assistance of a financial advisor, whose role becomes increasingly important. In addition, the debtor must also propose measures on how the company's continuity will be maintained. These new provisions allow the Court to have a more realistic view on the debtor's financial position, and also discourage bad-faith debtors. The Reparation Act sanctions any incomplete file by rendering it as inadmissible.

The Commercial Court is given a reinforced power to control the procedure. If the Court is of the opinion that a debtor failed to ensure the company's continuity, the Court may dismiss the insolvency procedure. Previously, the Act stipulated that the Court could review whether the collective reorganization plan complied with procedural rules and public policy. Currently, the Reparation Act allows the Court to consider whether the plan is actually adequate to guarantee the company's continuity, which is part of the public policy review. The legislator introduced this provision to reduce the debtor's potential competitive advantages in comparison with its sector.

Protection of creditors

Several provisions of the Reparation Act aim to offer better protection to the creditors of a company initiating a judicial reorganization procedure. First, the rights that affected the creditors in a previous judicial reorganization cannot be compromised again if the company reapplies for this particular insolvency procedure within five years. In executing a collective reorganization plan, the debtor is also obliged to pay each creditor at least 15% of that creditor's claim. Creditors must be informed about the purpose and duration of the insolvency procedure. To reinforce transparency, the debtor must submit a complete list of all known creditors to each creditor at the beginning of the reorganization. Additionally, with the creation of an electronic file, there is improved access to information about a company's judicial reorganization. Finally, under the Reparation Act, a debtor who is granted a stay of enforcement against claims can only pay a creditor voluntarily if such payment favours the company's continuity.

Protection of employees

The Reparation Act, also aims at protecting employees whose positions are significantly improved. In preparing a reorganization plan, the company may not reduce or remit claims arising from employment services that were performed before the start of the insolvency procedure. Furthermore, employees are protected if there is a transfer of undertaking as part of the reorganization. Preserving employees' rights in the event of a change of employer—by way of transfer under judicial supervision—as result of a judicial reorganization, is further clarified in the Collective Labor Agreement No. 102. Finally, the situation of employee representatives in the bodies of the company is specifically regulated. Regardless of whether the company will be transferred because of reorganization, the employee representatives keep their positions as well as the dismissal protection that is associated with their role.

Transfer of undertaking under judicial authority

Under the Reparation Act, the court-appointed receiver has more duties if there is a transfer—under judicial supervision—of all or part of the business. This receiver may only consider offers if the price is at least equal to the estimated value of the company in the event of a forced bankruptcy or liquidation.

COUNTRY UPDATE ON BRAZIL

New M&A Committee In Brazil

By Orlando Parente da Camara Filho, Höfling, Thomazinho Advocacia, São Paulo, Brazil (opcfilho@hkt.com.br)

A new committee has been created in Brazil for the voluntary control of merger and acquisition transactions in publicly traded companies. As of August 2013, any companies willing to make a public offering of securities may do so under the monitoring of the M&A Committee (Comitê de Aquisições e Fusões – CAF), an entity jointly conceived and created by local organizations related with the financial market and BM&FBovespa, the São Paulo Stocks Exchange.

The committee also results from the efforts of CVM, the regulatory commission on securities in Brazil, who advocated in favor of the institution of an organization similar to the UK Takeover Panel, to compensate for possible gaps in the local laws and regulations. The idea was to create an institution that would be supplemental to the CVM.

The UK Takeover Panel has been operating since 1968. Based in London, its main functions are to supervise takeovers and thus to provide equal treatment to shareholders on takeover bids. It has issued and administers the City Code on Takeovers and Mergers. Although not originally vested with the legal power to enforce its decisions, it has always had government support and gained certain coercive powers in recent years.

Inspired on the British model, the purpose of the Brazilian CAF is to ensure fairness in the public offering of securities, by defining criteria for the valuation of companies and for their public offerings, enabling investors to submit the transaction to a review by the committee, which is composed by a technical board and a mix of representatives from the organizations that created the CAF and independent ones. Their functions include both consulting and case judgment.

The main reason behind the creation of the CAF is the conflict between minority and controlling shareholders upon the public offering of shares. These are commonplace particularly when a purchaser must place an offer over the minority shares, as well as in intra-group transactions. Minority shareholders will often challenge the company's valuation, seeking a fair value for their own shares, which frequently delays the transactions and scares off investors, who fear they might be forced to sell their shares for less than their market value. With the committee's institution, minority shareholders may now count on a new tool for ensuring equitable conditions in corporate restructuring and major takeovers.

To achieve its goals, the CAF has conceived its own Regulation Code, the body of rules that sets forth the guidelines for M&A transactions. Some of the principles informing the Code are equitable treatment of the holders of each class of shares; broad release of information; the right of shareholders and officers to voice their opinions; fast decision-making; restriction to the admission of shareholders whose by-laws contain illegal or unreasonable provisions; avoidance of abuse, or the use of information to create artificial conditions for negotiation of shares; protection of confidentiality; among others. The principles may be invoked whenever a situation arises that is not plainly foreseen in the Code.

Adherence to the CAF requires the inclusion of a provision in the company's bylaws, whereby its shareholders undertake to follow the rules of the CAF Code and to abide by the Committee's decisions. Officers and members of the board are also supposed to make the same commitments.

Companies who choose to benefit from the CAF's supervision are granted a seal, which should become a sign of value for investors in the securities market, much like those companies that adopt corporate governance rules. They have the option of adhering to the CAF on a permanent basis, or just to submit one-time transactions to its revision.

Two of the main rules contained in the CAF Code address issues that the Brazilian laws have failed to regulate in sufficient details. First, the introduction of a mandatory public offering when a relevant share ownership is attained without the takeover of control power – the Brazilian Corporations Act does not require the offering in such cases. This situation may result from the acquisition of minority participation, negatively affecting the overall value of the shares. Another provision regards the forbiddance of unequal treatment of shares of the same class, unless the holders of the less favored class so agree or the CAF rules out the distinction, based on the shares' market price.

Given that the CAF is a private institution and adherence is voluntary, it does not have the power to enforce the provisions of its rules and decisions, but it is entitled to send out warnings or reprimands, as well as to withdraw its seal from affiliated companies that disrespect its norms. It may also report any irregular practices to the CVM, which is empowered to take legal action. The independence and complementarity of both organisms is a novelty that may require some adaptation, but is seen as a major development in the Brazilian M&A scenario.

COUNTRY UPDATE ON CANADA

Activism Update: Ontario Court in Bioniche Clarifies Rights of Dissidents in Requisitioning a Contested Meeting

By Gordon Cameron, Partner, Stikeman Elliott (NY) LLP, New York, NY (gcameron@stikeman.com)
and Maria Reda, Associate, Stikeman Elliott (NY) LLP, New York, NY (mreda@stikeman.com)

The Ontario Superior Court of Justice recently issued its decision in *Wells v. Bioniche Life Sciences Inc.* The decision is noteworthy in that it clarifies a number of significant issues that both dissident shareholders and boards must deal with in the face of contested meetings, finding that:

- Only registered shareholders are entitled to requisition a shareholder meeting under the Canada Business Corporations Act ("**CBCA**").

- A requisition must contain sufficient detail to allow shareholders to make an informed decision about the business proposed in the requisition (including names and qualifications of proposed director nominees).

- A requisitioning shareholder may be entitled to call its own shareholder meeting under s. 143(4) of the CBCA even if the target's board is justified under the CBCA in refusing to call the meeting in response to the requisition.

Background

Bioniche Life Sciences Inc. ("**Bioniche**") is a biopharmaceutical company incorporated under the CBCA.

William Wells and Gregory Gubitz, both former employees of Biovail Corporation, collectively own approximately 6% of Bioniche's outstanding common shares. In April 2013, Wells expressed displeasure to Bioniche's board in a letter and subsequently issued a press release. Shortly thereafter, Wells submitted a requisition (the "**First Requisition**") to call a meeting of shareholders to remove and replace all of Bioniche's directors.

At the time of the First Requisition, Wells held his shares through an intermediary and as such while beneficially owning his shares was not a registered shareholder of Bioniche. Wells also did not provide the names or any biographical information about his proposed director nominees. Bioniche's board declared the First Requisition invalid because it was submitted by a beneficial shareholder, as opposed to a registered shareholder, and because it failed to identify or provide any information about the proposed director nominees. The board also set November 5, 2013 as the date for the company's annual meeting of shareholders with a record date of September 9, 2013.

Wells subsequently registered his Bioniche shares in his name and submitted a second rectified requisition (the "**Second Requisition**"), identifying as well his proposed director nominees. Despite determining that the Second Requisition was valid under section 143(1) of the CBCA, Bioniche's board determined that it was under no legal obligation to call a meeting of shareholders given that a meeting has been scheduled for November 5, 2013 for which a record date had already been fixed, and it was therefore not in the best interests of the company to proceed with a special meeting.

The dissidents commenced an application to the court to seek an order requiring Bioniche to hold a special meeting and about 20 days later, relying on section 143(4) of the CBCA, they unilaterally called a special meeting of shareholders scheduled for August 27, 2013.

Issues before the Court

Was the First Requisition Valid?

Bioniche declared the First Requisition invalid because it was submitted by a beneficial shareholder, as opposed to a registered shareholder, and because it failed to identify or provide any information about the proposed nominee directors. The court agreed on both counts.

Regarding the first rationale, the court confirmed well settled law in holding that only a registered shareholder is entitled to requisition a shareholder meeting pursuant to section 143(1) of the CBCA. The court did note that while the Bioniche board was entitled to treat the requisition from a beneficial shareholder as valid, it was also entitled to decline to do so.

Regarding the second rationale, the court stated that the precedent cases send out "mixed signals". It noted that section 143(2) of the CBCA only requires a requisition to "state the business to be transacted at the meeting", while section 135(5) requires that a notice of meeting regarding special business state "the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon." Reading these two sections together, the court stated that it is reasonable to conclude that the details of the business to be transacted at the meeting contained in the requisition should be sufficient to enable the directors to issue a notice of the requisitioned meeting, which in turn contains sufficient detail to permit the shareholders to form a reasoned judgment thereon.

As a result, the court concluded that in the case of a requisition which seeks the election of new directors such "sufficient detail" would include the names and qualifications of the director nominees proposed by the dissident shareholder.

Was the Bioniche board entitled to refuse to call a special meeting of shareholders in response to the Second Requisition?

Section 143(3) of the CBCA provides that on receiving a requisition, the directors shall call a meeting of shareholders to transact the business stated in the requisition unless certain excepting circumstances exist. Such excepting circumstances include that a record date has already been fixed for a shareholder meeting and notice of it has been given or the directors have already called a meeting of shareholders and have given proper notice. If the directors do not call a meeting in response to a valid requisition within 21 days, then the requisitioning shareholder can unilaterally call a shareholder meeting.

As noted above, upon declaring the First Requisition invalid on May 3, 2013, the Bioniche board set a meeting date of November 5, 2013 for its annual general meeting and set a record date. The meeting date was set 6 months away. In responding to the Second Requisition, Bioniche argued it was under no obligation to call a special meeting in response to the requisition because it had set a record date for a future meeting and as such it fell within one of the exceptions in section 143(3) of the CBCA.

The court agreed, in part.

In citing the prevailing jurisprudence, the court stated that a shareholder's right to requisition a meeting "is only meaningful if it can be exercised in a timely and expeditious matter". In reviewing the exceptions in section 143(3) of the CBCA, it noted that in order to rely on the exception, "the meeting in respect of which [the directors] have fixed a record date before receiving a requisition must be scheduled for a time reasonably soon after the receipt of the requisition."

In assessing whether Bioniche had met this requirement in fixing the November 5, 2013 meeting date, the court weighed certain factors and concluded that although it had difficulty understanding "why half a year is necessary"…."the actions of Bioniche's Board reflect a reasonable exercise of business judgment…sufficient to bring it within the exception set out in CBCA s. 143(3)(a)."

Were the dissidents entitled to unilaterally call a shareholders' meeting under s. 143(4) of the CBCA?

Section 143(4) of the CBCA provides that if the directors of a company do not within 21 days after receiving a valid requisition call a meeting, any shareholder who signed the requisition may call the meeting.

The Bioniche board took the position that, as it could properly rely on an exception under the CBCA, the requisitioning shareholder was not entitled to call the meeting. Bioniche argued that the right of a requisitioning shareholder to call the meeting could only be exercised in the event directors, without justification, refused or failed to call a requisitioned meeting.

The court disagreed, but on the facts sided with Bioniche. Although the court concluded that the shareholders enjoy the right under the CBCA to unilaterally call a shareholders meeting, it decided not to allow the shareholders to proceed with the called August 27, 2013 meeting of shareholders in this case in part because the court felt two meetings within close proximity would be costly to the company and it saw no prejudice in waiting until the November annual meeting.

Observations

In a well written decision, Justice Brown re-affirms some well accepted legal principles (i.e. only a registered shareholder is entitled to requisition a shareholder meeting) but also provides clarity on some other less established issues. He definitively concluded that to be valid, a requisition regarding the election of directors should contain a list of nominee directors and some biographical information and that notwithstanding the fact that a board may be able to rely on an exception in concluding not to call a shareholder meeting in response to a requisition, a court may nevertheless intervene if a board is trying to unduly delay a requisitioning shareholder's day in front of shareholders.

For target companies, this case highlights that one key tool in a company's tool box is its ability to control the process. A company has the ability to determine the validity of requests from shareholders (i.e. requisitions, shareholder proposals, requests for shareholder lists etc.) and ultimately controls the meeting and proxy tabulation process. In reviewing directors' conduct, courts will apply the business judgment rule and will generally uphold determinations made by a board in the proper exercise of their statutory obligations.

For dissident shareholders, this case highlights the need to be well advised and to ensure compliance with technical legal requirements failing which it risks losing any procedural advantages it may have. It also highlights that courts may be willing to intervene if a target company is trying to frustrate a bona fide attempt by a shareholder to exercise its rights under corporate law. Lastly, where a dissident shareholder argues that a delay of a shareholder meeting would result in a prejudice, the dissident must be willing to act quickly to exercise its rights as the court will consider such a factor when determining how much weight should be attached to the asserted prejudice.

COUNTRY UPDATE ON CHILE

Update from Chile

By Marcos Ríos, Partner, Carey, Santiago, Chile (mrios@carey.cl)
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I. <u>Market activities and trends</u>

The rapid and healthy growth of the Chilean economy continues to provide attractive business opportunities for foreign investors. During 2012, Chile was the world's seventh economy in terms of amount of incoming foreign direct investment, and the third in Latin America after Mexico and Brazil. Chile has also been a main M&A player in the region, totaling more than USD 9 billion in M&A transactions in 2012.

During 2013 (as at September 20) 41 M&A transactions have been announced (i.e., excluding lapsed and withdrawn deals), for an aggregate value of approximately USD 5.2 billion. Among the major ones are the acquisition of Provida by Metlife for approx. USD 2.4 billion, and the acquisition of AFP Cuprum by Principal for approx. USD 1.4 billion. Outbound M&A transactions have also increased significantly, with takeovers such as Carrefour Colombia by Cencosud for USD 2.6 billion, City National Bank of Florida by Banco BCI for USD 883 million, and Helm Bank by Corpbanca for USD 1.3 billion.

While the financial and retail sectors have been very active in M&A transactions, we foresee that the main focus of M&A activity in the coming year will likely be the mining and energy sectors.

II. <u>Legal Developments</u>

During the course of 2013 there have been some significant legal developments intending to improve Chile's legal and regulatory framework for business ventures. The most salient ones relate to simplifying company start-ups, improving the regulation of public company registration, issuances and public offers, and enhancing certain reporting requirements.

(i) Simplifying Company Start-Ups

On May 2, 2013, Law No. 20,659 (also known as the "One-Day Company Law") and its respective regulations came into force. These provide a new simplified regime for the creation, amendment, transformation, merger, spin-off and dissolution of certain legal entities. The new system is very straightforward and expedites the process of company start-ups, by providing an online form of articles and bylaws (estatutos) and an electronic online registry of legal entities, and doing away with red tape, such as former registration and publication requirements.

As a result, legal entities may now be created and be up and running in only one business day. In addition, the online forms and registration process are free of charge, which is an important breakthrough in cost-effectiveness.

While any type of legal entity (other than public corporations or sociedades anónimas abiertas), may benefit from this system, the system will be made available for the various types of entities at different dates. The only types of entity currently benefiting from the system are limited liability companies or sociedades de responsabilidad limitada and individual limited liability enterprises or empresas individuales de responsabilidad limitada. The system is expected to be available for stock companies (sociedades por acciones) in June 2014, and for corporations (sociedades anónimas cerradas) in June 2016.

(ii) Amendment to public company procedures and reporting requirements

Generally Applicable Rule No. 30 ("GAR 30") is a key regulation issued by the Securities and Insurance Superintendence ("SVS"). It essentially sets forth the registration processes of publicly-traded securities and of issuers of such securities, and the ongoing information and reporting obligations relating to entities registered with the SVS and to share and bond issuances.

In May 2013, the SVS made substantial changes to GAR 30 by passing Generally Applicable Rule No. 346 ("GAR 346"). The purpose of GAR 346 is to clarify and update certain reporting obligations and enhance the level of information that issuers are required to deliver to the market. The main innovations made by NCG 346 include: (i) providing greater clarity on procedures and information requirements applicable to listed issuers by, for example, adding a new de-listing process for issuers and securities; (ii) providing mandatory IFRS compliance for financial statements of entities seeking SVS registration; (iii) repealing certain outdated regulations; and (iv) facilitating listed companies' delivery of certain documents and information to the SVS, through a new online system.

COUNTRY UPDATE ON FINLAND

Recent Study about Conditions Precedent in Finnish M&A Deals

By Juha Koponen, Partner, Castrén & Snellman Attorneys Ltd, Helsinki, Finland (juha.koponen@castren.fi),
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An area of particular interest for M&A practitioners is the issue of deal security; that is, the tension between the interests of the seller who usually wants to make certain that the deal will close and the buyer who would like to have the flexibility not to close on the agreed terms if certain key conditions cannot be fulfilled. The use of conditions precedent is a common way of dealing with those most crucial issues that need to be overcome before a transaction can be completed. However, due to the fact that most commercial disputes in Finland are settled by means of confidential arbitration, more thorough information on the conditions precedent used in Finnish M&A deals is largely unavailable to the public.

For this reason, earlier this year we surveyed 31 M&A deals handled by our firm between 2010-2012, which had a separate signing and closing. The average value of these transactions was EUR 61.4 million. Of the 31 deals we surveyed, 15 included a private equity ("PE") investor as a buyer or seller. We also attempted to compare the statistical differences between the type and number of conditions precedent used in deals which involved PE investor versus those conducted between industrial par-ties only.

The types of conditions precedent most commonly used in the deals we surveyed included: (1) regulatory approval for the acquisition; (2) accuracy of the seller's warranties at closing; (3) third party consent; (4) non-occurrence of any material adverse effect (MAE); and (5) the buyer being able to obtain financing.

Our findings are briefly summarized in the charts below.

Frequency of conditions precedent in Finnish M&A deals

Type of Condition	Both Parties Industrial	Seller PE / Buyer Industrial	Seller Industrial / Buyer PE	Both Parties PE
Regulatory Approval	59 %	100%	75%	67%
Seller's Warranties at Closing	36%	-	50%	100%
Third Party Consent	23%	-	-	67%
MAE Clause	32%	-	50%	33%
Buyer's Financing	5%	-	50%	100%

Average number of conditions precedent in Finnish M&A deals	
Type of Party	**Average Number of Conditions Precedent**
Both Parties Industrial	3.9
Seller PE, Buyer Industrial	2.0
Seller Industrial, Buyer PE	3.8
Both Parties PE	6.7
Average of all transactions	4.1

These findings show that deals between two PE investors tend to be the most conditioned. It also shows that PE investors are typically strong negotiators and may be able to better control the progress towards closing whether they are buyers or sellers.

COUNTRY UPDATE ON INDIA

Update from India

By Vishal Gandhi, Managing Partner, Gandhi & Associates, Mumbai, India (vishal@gandhiassociates.com)

Significant legal developments relating to mergers and acquisitions and joint ventures have taken place in India this year. Some of the key developments are as follows:

New Companies Act

A new Companies Act—the Companies Act, 2013 (the "2013 Act") has been notified on August 30, 2013. The 2103 Act will replace the Companies Act, 1956 (the "1956 Act") in a phased manner i.e. the Government will notify sections that would come into force from time to time.

- **Indian incorporated companies permitted to merge with foreign incorporated companies**

  One of the fundamental changes proposed by the 2013 Act is permitting Indian incorporated companies to merge with foreign incorporated companies. Under the 1956 Act, while a foreign incorporated company could merge with an Indian incorporated company, an Indian incorporated company could not merge with a foreign incorporated company. However, this type of merger will be permitted only with foreign incorporated companies located in specified jurisdictions. Also, for such cross-border mergers compliance with special rules will be required which will be notified by the Government in consultation with the Reserve Bank of India.

- **Class action suits**

  Class action suits have been permitted to be filed by members and/or depositors against the company, its directors, auditors or any advisor of the company in cases where the company is acting ultra vires its charter documents or is breaching the provisions of its charter documents and in certain other specified cases.

- **Shares of a public company**

  The contentious issue of whether an inter se contractual arrangement in respect of transfer of shares between shareholders of a public company has now been put to rest. Now, such inter se contractual arrangements have been clarified to be enforceable.

Acquisition of shares by promoters of listed companies

Foreign promoters who are in control of Indian listed companies have been permitted to acquire additional shares from an Indian stock exchange. Earlier, if foreign promoters desired to do so then they would have to seek the prior approval of the Foreign Investment Promotion Board.

Further Liberalization of the Foreign Direct Investment Regime

The Government has further liberalized the foreign direct investment regime, and announced the opening-up of various sectors as follows:

- **Telecom Sector**: Foreign investment in the telecom sector has been increased to 100%;

- **Single-brand product retailing**: Foreign investment in this sector has been put under the automatic route up to 49%.

- **Multi-brand product retailing**: The mandatory sourcing of local products from "small industries," earlier defined to mean industries having investment in plant and machinery up to US$ 1M, have now been redefined to include investment in plant and machinery up to US$ 2M.

COUNTRY UPDATE ON LUXEMBOURG

The new Luxembourg Special Limited Partnership

By Dirk Leermakers, Partner, Stibbe, Luxembourg (dirk.leermakers@stibbe.com)

On July 12, 2013, Luxembourg Parliament enacted into law the European Alternative Investment Fund Manager's Directive (AIFMD, Directive 2011/61/EU). The Luxembourg legislator took this opportunity to amend the legislation on commercial companies and to introduce in the Company law a brand new form of Limited Partnership, the "société en commandite simple spéciale", loosely translated as Special Limited Partnership (SLP).

In so doing the legislator has taken the existing regime of the Limited Partnership ("société en commandite simple"), which has remained largely unchanged since 1915 when the Company Law was first introduced, and has added a number of features to it so that the new SLP – regime would constitute a credible alternative to Anglo-Saxon fund structures generally preferred by fund promoters and administrators.

As is the case with the Limited Partnership, the SLP is a partnership that consists of one or more general partners (whose liability is joint and several with that of a partnership itself) and of one or more limited partners (whose liability is limited to the contribution they have agreed to make to the SLP).

In contrast to the Limited Partnership, which is a distinct legal entity in its own right, the SLP does not have a separate legal personality of its own.

However the legislator has given the SLP a number of features so as to mitigate the possible negative effects of not being a distinct legal entity. These features are the following:

- the SLP has a domicile (registered address) at the place of its central administration;
- registrations and other formalities pertaining to the assets that have been contributed to the SLP are to be done in the name of the SLP;
- the SLP may have its own name which is distinct from that of the General Partner(s) and the Limited Partner(s); and
- the assets contributed to the SLP shall be exclusively reserved to the creditors of the SLP whose rights have arisen on the occasion of the formation, the existence or upon liquidation of the SLP, to the exclusion of the personal creditors of the SLP's partners, who shall have no recourse against the SLP's assets.

An SLP may, but need not, have its own statutory capital. It is possible to make contributions in cash or in kind to an SLP, and even contributions of future activity which are not capable of being valued in monetary standards.

In addition to having its jointly and severally liable General Partner, an SLP may also have one or several managers who are not a general partner, and who shall be liable for the performance of their duties based on the rules applicable to directors of limited liability corporations.

If shares or units are issued in an SLP, these may carry equal voting rights or differentiated voting rights.

It is also possible to limit the voting rights attaching to shares/units on a case-by-case basis.

The parties are free to determine the allocation of the profits of an SLP as they deem fit. If nothing else is provided for, the partners will share the profits in proportion to their respective interest in the SLP.

Partnership interests may also be redeemed if the partnership agreement so allows. This will allow an SLP to be used to set up an open-ended fund in which a limited partner may leave the partnership at certain times.

The transferability of limited partners' interests shall be as set forth in the partnership agreement. Absent any provisions to the contrary in the partnership agreement, the consent of the general partner(s) shall be required.

Finally, it is possible to transform an existing SLP into a legal entity of a different kind, for example one endowed with legal personality.

From the standpoint of Luxembourg corporate taxation, an SLP shall be considered as a wholly tax transparent entity, meaning that the partners for tax purposes shall be treated as owning the SLP's assets directly.

By introducing this this new regime, Luxembourg hopes to have provided the fund industry with a flexible vehicle that is tailored to their needs and that may obviate the need to choose for the formation of a fund a jurisdiction other than Luxembourg for structures that otherwise have their main nexus with Luxembourg.

COUNTRY UPDATE ON NEW ZEALAND

Update from New Zealand

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NEW COMMERCE COMMISSION MERGERS AND ACQUISITIONS GUIDELINES

On 24 July 2013, the New Zealand Commerce Commission (Commission) published new Mergers and Acquisitions Guidelines (Guidelines)[1].

Under the Commerce Act 1986, which is the New Zealand competition / anti-trust legislation, mergers that substantially lessen competition in a market are illegal unless they are authorized by the Commission. The Commission will provide clearance / authorization to a proposed merger where it is satisfied that the merger would not be likely to substantially lessen competition in any New Zealand market, or if it is satisfied that the merger would result in such a benefit to the public that it should be permitted even though it may substantially lessen competition.

The Guidelines explain how the Commission assesses whether or not an acquisition of a firm's assets or shares would be likely to substantially lessen competition in a market, and set out the process that the Commission follows when considering clearance applications. The revisions to the Guidelines, which were finalized after a public consultation period in March, reflect developments in case law and international experience, as well as following plain English drafting, but are not a substantial departure from the previous guidelines.

The key changes are:

- The Commission sets out in detail how it approaches the counterfactual analysis (i.e. what will likely happen without the merger).
- There is increased emphasis on the conditions of entry to and expansion of a market and their role in influencing the likelihood, extent, and timeliness of entry and expansion by existing or new competitors.
- It is noted that market definition is a tool to aid in competition analysis, rather than an end in itself. The Commission recognizes that the relevant market/s need not always be defined precisely.
- A more detailed explanation of how the Commission assesses mergers between competing buyers.
- Change in language from "market share safe harbours" to "concentration indicators".
- Inclusion of the merger process guidelines, and the Commission's divestment and failing firm guidelines.

[1] Available at www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/, accessed 27 September 2013.

COUNTRY UPDATE ON SPAIN

Update from Spain

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ACT FAVORING ENTREPRENEURS AND THEIR INTERNATIONALIZATION

The recently approved act, which has not yet been published in the Spanish Official Gazette, implements reforms in various sectors (corporate, bankruptcy, tax, administrative and labor) to stimulate the development and internationalization of entrepreneurship.

In the corporate sector, we underline the measures introduced to speed up the incorporation of companies and simplify certain corporate obligations, and the new figure of the sequentially incorporated private limited company —a company with no minimum share capital that must fulfill specific self-financing requirements—.

As regards bankruptcy, we underline the more flexible approach to the quorum of financial creditors required for court approval of refinancing agreements, and the new regulation on out-of-court agreements as mechanisms for out-of-court negotiations with creditors for individuals and legal entities that fulfill specific requirements.

ACT 3/2013, OF JUNE 4, CREATING THE NATIONAL MARKETS AND COMPETITION COMMISSION

Act 3/2013 implements a significant reform to Spanish competition and regulatory institutions. Specifically, it creates a new National Markets and Competition Commission that will take over the functions of the National Competition Commission and those of the sectoral regulators in charge of telecommunications, energy, postal services, airports, rail transport and gambling.

Act 3/2013 has also revoked the so-called "function 14," which had regulated business transactions in the energy sector being subjected to administrative control. In short, the control procedure consists of the ex post notification of certain business transactions in the energy sector, emphasizing the inclusion of certain activities related to liquid hydrocarbons, together with the already traditional competences in the gas and electricity sectors. The competent authority is the Ministry of Industry, Energy and Tourism.

SUPREME COURT RULING OF MAY 27, 2013: VALUATION OF THE UNITS OF AN EXCLUDED PARTNER

The Supreme Court establishes that if a director-partner is excluded from a private limited liability company for breach of prohibition on competition, the valuation of his/her units must be based on the date on which the final judgment is enacted and the exclusion becomes fully effective and not on the date the exclusion is agreed by the partners general meeting.

From a practical standpoint, this ruling is noteworthy because the lapse of time between the date of the corporate resolution and the effective date of the sentence if the excluded partner legally challenges the decision can result in a substantial difference in the valuation of the excluded partner's units.

SUPREME COURT RULING OF JUNE 25, 2013: COMPENSATION FOR EXPIRY OF OFFICE AS MANAGING DIRECTOR

In this case, the Supreme Court specifies that the managing director is entitled to compensation under the termination regime of his indefinite-term senior management contract, even if termination results from the managing director not being reappointed by the shareholders general meeting once the term of office has expired.

The practical consequence deriving from this ruling is that it must be contractually regulated in the managing director's contract whether failure to renew this position once the term of office has expired will entitle the managing director to any compensation for termination.

COUNTRY UPDATE ON THE NETHERLANDS

Listed companies' 'response time' to shareholder activism tested in court

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Introduction and summary

In Dutch corporate governance rules, there is a clash between shareholder rights to include agenda items for shareholders' meetings and the right of the board to invoke a response time when its strategy under attack.
This legal tension has been the subject of discussion in the Netherlands the past few years. See also the country update on the Netherlands in the Newsletter of December 2010.

On September 6, 2013 the Enterprise Chamber of the Amsterdam Court of Appeal ("Enterprise Chamber"), in the Cryo-Save/Amar case, issued a decision in this regard (Cryo-Save Group/Amar). The decision affects the balance of power between the shareholders and the board of listed companies. In summary, the Enterprise Chamber (i) upheld the response time stipulated by the board under the Dutch Corporate Governance Code (the "Code"), (ii) ruled that the response time is not inconsistent with the right of shareholders to include items on the agenda or convene a shareholders' meeting under the Dutch Civil Code ("DCC") and (iii), as a consequence, effectively held that the Code may override the DCC.

The right to include items on the agenda of the shareholders' meeting

The DCC allows a shareholder to include items on the agenda of the next shareholders meeting if (i) the shareholder alone, or jointly with other shareholders, represents no less than three per cent of the issued capital, (ii) the request is made no later than 60 days before the relevant shareholders meeting and (iii) the rationale and substance of the request is adequately explained. Shareholders can also be given the power to convene a shareholders meeting in the articles of association or – under certain circumstances – be authorized by the court to convene a shareholders' meeting.

Although the rights of shareholders to convene a meeting or include items on the agenda of the shareholders' meeting are therefore clearly provided for by Dutch legislation, there was an open question as to what extent the shareholders of listed companies would be able to exercise these rights if the agenda item proposed to be included could result in a change of the company's strategy. This uncertainty was created by certain best practice rules in the Code.

The Corporate Governance Code

The Code contains principles and best practice provisions that regulate the relations between the management board, the supervisory board and the shareholders of listed companies, based on the 'comply or explain' principle. The Dutch Supreme Court has confirmed that the Code reflects legal principles prevailing in the Netherlands.

The Code provides that in response to a shareholder's request to put an item on the agenda of a shareholders' meeting, the board shall be given the opportunity to stipulate a reasonable period in which to respond (the 'response time') if the agenda item may result in a change in the company's strategy. The maximum response time that the board may stipulate is 180 calendar days. The board must use this time for "further deliberation and constructive consultation" and to explore possible alternatives. Because the Code explicitly states that the shareholder shall respect the response time, it appears that a shareholder is not allowed to exercise its right to put an item on the agenda to the extent that such exercise is incompatible with the stipulated response time.

It was unclear how Dutch courts would deal with the tension between, on the one hand, the rights of shareholders under the DCC and, on the other hand, the right of the board to stipulate a response time under the Code.

The decision by the Enterprise Chamber

The Cryo-Save/Amar case allowed the Enterprise Chamber to consider for the first time the relationship between the response time and the statutory rights of shareholders.

The Enterprise Chamber held that the response time is not at odds with the right of shareholders to put items on the agenda. In the Enterprise Chamber's view, the best practices rules do not deprive shareholders of any rights: they merely elaborate how the shareholders can use their rights while adhering to the general duty to act in accordance with the principle of reasonableness and fairness that must be observed by and among the company, its corporate bodies and its shareholders. According to the decision, the following tests apply:

(1) The board has to show that there is a valid reason to assume that a requested agenda item may lead to a change of the company's strategy and that additional time is therefore necessary to deliberate and consult.
(2) If requirement (1) is satisfied, the shareholder must respect the response time that has been stipulated by the board unless there are sufficiently important reasons to set aside the response time.

The decision does not resolve all questions regarding the legal tension between the rights of shareholders under the DCC and the response time under the Code.

Firstly, we note that the facts of this case made it easy for the Enterprise Chamber to uphold the response time, since the shareholder's behavior did not comply with the principle of reasonableness and fairness that applies among the company's constituents. Therefore, the Cryo-Save/Amar case does not provide a great deal of clarity on how the Enterprise Chamber will decide in cases where the shareholder has been more careful in observing the reasonableness and fairness test.

Secondly, it is still uncertain what effect the best practice rules can have if a shareholder ex ante informs the market that he will not comply with the response time. We note that various institutional investors specifically reserve their rights with respect to the response time in accordance with the 'comply or explain' principle of the Code. Such ex ante deviation from the best practice rules relating to the response time may well have an impact in determining whether the response time should be respected in a specific case.

More generally, we note that there is room to criticize the legal test that has been adopted by the Enterprise Chamber. A more stringent test for stipulating a response time has been advocated in legal literature. It is possible that the Supreme Court will be called upon to determine how the statutory right of shareholders to put items on the agenda on the one hand, and the response time under the Code on the other hand, relate to each other.

COUNTRY UPDATE ON TURKEY

Notification Requirement Introduced by Article 198 of the New Turkish Commercial Code

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Turkish Commercial Code No. 6102[1] ("**TCC**"), which entered into force on July 1, 2012, significantly modified the longstanding legal framework of Turkish corporate law. Hence, since its enactment, it has been subject to lengthy analysis and discussions. This article provides a brief overview of Article 198 of this new law ("**Article**"), which is also almost repeated under Article 107 of the Regulation on Trade Registry[2].

It is important to note that the Article applies only with respect to "groups of companies", which is a concept newly introduced in Turkish law with the provisions of Articles 195-209 of the TCC. As further clarified under the Regulation on Trade Registry, a group of companies will be deemed to exist in the event that there are at least two capital companies directly or indirectly connected with another capital company, or more than two capital companies directly or indirectly connected with an enterprise (which is not a capital company) in one of the manners stipulated under Article 195 of the TCC: (i) having majority voting rights in another commercial company, or (ii) being entitled under the articles of association to ensure the election of number of members forming a majority enabling them to take decisions within the managing body of the other company, or (iii) in addition to its own voting rights, forming the majority of voting rights in the other company, solely or together with other shareholders or partners in reliance upon a contract, or (iii) holding another company under its control in accordance with a contract or by other means.

The concept presented by the Article intents to promote transparency in respect of group companies. Pursuant to its first paragraph, in case an enterprise[3] directly or indirectly holds as a result of the relevant transaction 5%, 10%, 20%, 25%, 33%, 50%, 67% or 100% of the shares of a company or once its shares in a company fall under the cited thresholds, the enterprise should inform the board of directors of the relevant company whose shares are being transferred and the relevant authorities such as trade registry and any other authorities mentioned in relevant laws within 10 days following the completion of transaction. The acquisition or disposal of shares at the thresholds stated above should be indicated in the annual activity and audit reports of the relevant company under a separate title and should be announced on the company's website (if this is applicable). Calculation of the percentages is formulated in Article 196 of the TCC in detail. The paragraph further sets forth that managers and board members of the enterprise or the company notify the shares of such company owned by themselves, their spouses and children, and the companies in which such individuals have 20% or more shares. The notifications are made in written, and registered with the relevant trade registry and announced in the Trade Registry Gazette.

As per the second paragraph of the Article, noncompliance with the said notification, registration and announcement obligations results in freeze of voting and other rights attached to the relevant shares; thus the relevant rights cannot be exercised as long as the breach continues, any votes casted during this period shall be deemed invalid and there will be no distribution of dividends based on the relevant shares. Therefore, it is worth to note that notification, registration and announcement requirements should be complied with in order to prevent all these possible complications due to the sanctions foreseen in the Article. Nevertheless, although notified, registered and announced as required, share transaction is not published in the web site of the company, voting and other rights attached to the relevant shares may not be affected but administrative monetary penalty and other sanctions indicated in the relevant provisions of the TCC e.g. concerning establishment of and announcements to be made in the websites of the companies may be imposed.

The Article further regulates, in its third paragraph, that controlling agreements[4] should be registered with the relevant trade registry and announced in the Trade Registry Gazette which are the conditions for the validity of such agreements. If a controlling agreement is not valid due to noncompliance with the third paragraph of the Article, the provisions of the TCC concerning obligations and liabilities of the group companies shall still be applied. In other words, in the event that the controlling agreement is not registered with the trade registry, contractual rights and obligations between its parties are not upheld; yet controlling company or its board of directors may be found liable according to the provisions of the TCC or other applicable laws concerning group companies for the transactions as a result of implementation of the controlling agreement as if the agreement is valid. It should be noted that when either of the controlling company or the subsidiary is located in Turkey, the provisions of the TCC regarding group companies shall be applied.

In line with the foregoing, entities and individuals covered by the Article should be aware of and comply with the rules as stipulated in the TCC and its secondary legislation.

1. Published in the Official Gazette dated 14 February 2011 and No. 27846.
2. Published in the Official Gazette dated 27 January 2013 and No. 28541.
3. The term “enterprise” is specifically used in this section on groups of companies under the TCC to cover both companies and real persons.
4. “Controlling agreement” (also referred by some scholars as "dominion agreement") is not defined under the TCC; however, the Regulation on Trade Registry defines this concept in Article 106 as “an agreement whereby a party becomes entitled to give instructions to another capital company’s management organ without being bound by any conditions, provided that there is no direct or indirect subsidiary relationship between the parties or even if there is, the instruction is given independently from this relationship”.

COUNTRY UPDATE ON UKRAINE

Update from Ukraine

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(1) Current Trends of Ukrainian M&A Market

Despite quite negative outlooks for M&A activities in Ukrainian market for 2013 (made late in 2012), a substantial increase in the total volume of M&A transactions have been identified within first half of the current year. In particular, in accordance with the available information, total amount of M&A transactions within first half of 2013 is close to appr. 3.5 bln. USD (compared to 2 bln. USD within the same period of 2012). However, the things do not look very optimistic if we look to local specifics of M&A transactions.

As previously, according to the data gathered from various media, the main trend is the exit of foreign investors from Ukrainian market due to both very complicated investment climate in Ukraine and economic situation outside Ukraine. Both mentioned factors lead to more efforts made by foreign investors for holding and or defending position on other, more priority markets (e.g. EU). As a result, in some cases foreign business groups acting as sellers are ready to move quickly from Ukrainian market and quite often sell the assets with losses.

As per the purchasers of (investors to) the business sold out by foreign business groups, the trend with mainly Ukrainian business groups acquiring business also remains intact. Substantial interest of Russian businesses may also be determined as one of the main factors.

Beside the deals which add up to total sale of business, quite essential part of M&A transactions may be characterized as a partial investment into the business (with operational control over the business remaining in the hands of local managers).

Increase in the amount, but decrease in the volume of M&A transactions, with the main interest in agricultural and power-consuming industry, should also be considered as main features of Ukrainian M&A market.

(2) Future Prospects

In our view, until 2015 (Presidential election) the main trends in Ukrainian M&A market will remain intact:

- Exit from Ukrainian market by foreign investors, supported by desire of Ukrainian and Russian business groups to increase their shares in some industries;
- Increase in the number of deals which add up to partial sale of business for the purposes of raising funds;

Also, it is quite probable that the number of transaction shall also fall down (in particular, more closer to Ukrainian Presidential election), along with increase in the share of Russian capital in M&A transactions.

(3) International Structuring of M&A Transactions

(i) Cyprus

Even following recent financial turmoil in Cyprus, due to advantages of its tax and legal systems, specifics of the DTT with Ukraine, the mentioned jurisdiction holds the lead in the amount of investments made in Ukraine. In a nutshell, most of M&A transactions with respect to Ukrainian business are structured at the level of Cypriot (holding) companies. Cyprus is also considered for any possible M&A activities of Ukrainian businesses even at the very early stage of molding tax efficient corporate structures.

At this, due to instability of Cypriot financial system, starting from 2012 most payments for the shares in Ukrainian businesses (acquired through Cyprus) are structured outside this jurisdiction. It is hardly possible that this will change in the nearest future.

(ii) Alternative Holding Jurisdictions

Both due to the recent financial turmoil in Cyprus and enactment of less favourable (when compared to the effective one) new DTT between Ukraine and Cyprus (to become effective as of 01.01.2014), Ukrainian businesses are now paying much more attention to other holding jurisdictions and in some cases tax and legal consultants may even hear total imperceptions of Cyprus as a holding jurisdiction.

Now such jurisdictions as Netherlands, Austria, Switzerland, Great Britain, Singapore, Hong Kong etc. are more actively considered by Ukrainian businesses, even though they are much more complicated than may be seen from the first glance and, moreover, some of them are very hard to use for so called “passive investment structures” most usually applied by Ukrainian business groups (and private clients in particular).

(iii) New Holding Jurisdictions

Malta and Luxemburg may be considered as potential holding jurisdictions for Ukrainian businesses.

In particular, Ukraine has recently ratified the DTT with Malta. Although the mentioned DTT is not really favourable with respect to interest and royalty flows, it allows for application of 5% withholding tax rate to outbound dividends (provided that the recipient is the beneficial owner and hold at least 20% in the share capital of the payer). Therefore, now Ukrainian businesses may more actively consider the mentioned jurisdiction for direct holding of shares in Ukrainian companies (prior to DTT application Malta had been actively considered by Ukrainian business groups primarily as a jurisdiction for intra-group trading companies or, in combination with some jurisdictions, for personal companies of ultimate beneficial owners).

Per our information, new DTT between Ukraine and Luxemburg is also under negotiation and may be signed and ratified by the parties in the nearest future, which, should it be the case, in our view, will make Luxembourg one of the main holding jurisdictions for direct holdings in Ukrainian companies (due to specifics of Luxemburg internal tax legislation). Hopefully, the new DTT will not have the same fate as the previous one (signed in 1997 and not in force until now).

(iv) Potential Move

Due to the above mentioned, we assume the decrease in the number of M&A transactions accomplished through Cyprus in the nearest future in favour of the above mentioned jurisdictions (in particular, Netherlands and Singapore). At this, the mentioned move should not be so active with respect to M&A transactions dealing with real estate assets (acquired either via share or asset deals) due to some specifics of both the current and new DTTs between Ukraine and Cyprus (e.g. non-application of so called “deemed real estate corporation” concept).

(v) Land-related Structuring

Land leaseholds have remained one of the core assets for inbound investments and substantial percentage of M&A projects add up to acquisition of land leaseholds (in most cases, by way of indirectly acquiring control over legal entities controlling land leaseholds). Specific rules for taxation of Ukrainian entities involved in agricultural sphere, along with proper structuring of such acquisitions both at Ukrainian and non-resident level, may provide sufficient level of tax efficiency to the operational and passive (investment) flows.

One of the main features of Ukrainian agricultural market nowadays is the process of active consolidation of land leaseholds, with a substantial number of M&A transactions as a result. Moreover, land reform, which, inter alia, is intended for cancelation of prohibition for sale of agricultural land plots, is actively discussed and estimated by Ukrainian businesses. Should the mentioned reform receive a “green light”, this will lead to a substantial number of investments into agricultural sector (both from local and foreign businesses). As a result, we may estimate an additional and substantial momentum at the Ukrainian M&A market, at least in respect of M&A transactions aimed at acquisition of land plots (either as share or asset deals). Furthermore, the mentioned momentum shall be supported by active development of see ports and grain elevators. Thus, in our view, Ukrainian agricultural market should be tracked on a regular basis, since will remain as a leader for M&A transactions in Ukraine.

COUNTRY UPDATE ON USA

Delaware Court Of Chancery Gives Important Guidance On The Value That Special Committees Of Directors Can Add To Transactions With Controlling Stockholders

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A recent opinion by the Delaware Court of Chancery potentially marks a major shift in how Delaware courts will analyze going-private transactions involving controlling stockholders. Chancellor Leo E. Strine, Jr.’s May 29, 2013 ruling in In re MFW Shareholders Litigation (“MFW”), if embraced by the Delaware Supreme Court, provides controlling stockholders with a roadmap to structure such transactions so that they may obtain deferential judicial review under the business judgment standard.

Background

In 2011, MacAndrews & Forbes Holdings Inc. (“MacAndrews & Forbes”), the controlling stockholder of M&F Worldwide Corp. (“M&F Worldwide”), proposed a going-private transaction through which MacAndrews & Forbes would acquire all of the equity interest in M&F Worldwide that it did not already own in exchange for cash. At the outset, MacAndrews & Forbes stated that any such transaction would be expressly conditioned on (i) the approval of a special committee of disinterested and independent directors of M&F Worldwide, and (ii) the affirmative vote of a majority of M&F Worldwide’s unaffiliated stockholders. MacAndrews & Forbes stated that it was not interested in selling its shares and would not vote in favor of any alternative sale, merger, or similar third-party transaction.

M&F Worldwide’s board of directors formed a special committee, giving it full power to negotiate the transaction with MacAndrews & Forbes and to say “no” to a transaction. The special committee selected its own legal and financial advisors, met frequently, and negotiated at length to secure a material increase in the price per share. The special committee approved the transaction, which was then approved by 65% of the stockholders unaffiliated with and independent of MacAndrews & Forbes. Plaintiffs pursued a damages case after the transaction closed, claiming that the both the price and the process employed in negotiating the transaction were not entirely fair. After discovery, the defendants moved for summary judgment, arguing that the deferential business judgment rule, and not the onerous entire fairness standard of review, should apply to a going-private transaction with a controlling stockholder that is conditioned on (i) the approval of both a disinterested, independent, and properly-functioning special committee of directors and (ii) a fully-informed and uncoerced vote of a majority of unaffiliated stockholders.

The Ruling

Since at least 1994, it has been generally understood (although not universally accepted) that going-private transactions between Delaware corporations and their controlling stockholders are always subject to the entire fairness standard of review, which requires that such transactions be shown to be entirely fair as to both the price of such transactions and the process by which those transactions were structured. This understanding arose out of the Delaware Supreme Court's seminal 1994 decision in Kahn v. Lynch Communications Systems ("Lynch"), in which the Supreme Court held that while approval of a proposed controlling stockholder transaction by either a special committee of disinterested and independent directors or a majority of non-controlling stockholders could shift the burden of proof to the plaintiffs to prove a transaction's unfairness, "the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness. . . ."

Despite this language from the Supreme Court's decision in Lynch, and other decisions since that have embraced this language, the Chancellor concluded in MFW that he was not bound to apply entire fairness review to the MacAndrews & Forbes going-private transaction. He reasoned that the Delaware Supreme Court has never been presented with a case where a going-private transaction was conditioned on the approval of both a special committee and a majority of the non-controlling stockholders, and thus has never actually held that entire fairness is the exclusive method of review for such a dual-approval structure. Considering the issue as a novel and unanswered question of law, the Chancellor held that a going-private transaction with a controlling stockholder that is conditioned from the outset on obtaining both such approvals should be reviewed under the deferential business judgment rule instead of entire fairness.

Importantly, the Chancellor provided specific guidance on what must be shown in order for approvals by a special committee and a majority of non-controlling stockholders to be given business judgment review. As to the approval by a special committee, the following conditions must be met:

- the special committee's members are independent of the controlling stockholder and disinterested in the transaction;
- the special committee is empowered to select its own independent legal and financial advisors;
- the special committee has the power to negotiate the terms of the transaction and to say "no" to the transaction; and
- the special committee must give due attention and deliberation to the process and otherwise meet its fiduciary duty of due care.

And as to the approval by a majority of unaffiliated stockholders, the following conditions must be met:

- stockholder approval is a non-waivable condition of the transaction;
- the stockholders receive all material information necessary to render their vote a fully-informed one; and
- the stockholders' vote is uncoerced.

Applying these conditions to the facts before him, the Chancellor ruled that the approvals by the special committee and a majority of the non-controlling stockholders were valid and effective to permit application of the business judgment rule to the MacAndrews & Forbes going-private transaction. The Court entered final judgment in favor of the defendants.

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COUNTRY UPDATE ON VIETNAM

Use of Foreign Currency in M&A Transaction Documents

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Within the territory of Vietnam the use of foreign currency is restricted pursuant to the Ordinance on Foreign Exchange Control 28/2005/PL-UBTVQH11 (Standing Committee of National Assembly of Vietnam dated December 13, 2005 (as amended on March 18, 2013) (the "**Ordinance**") and Decree 160/2006/ND-CP dated December 28, 2006 ("**Decree 160**"). Historically, the restriction on foreign currency in the Ordinance and Decree 160 has been understood to apply to transactions, payments, listings and advertisings for onshore commercial transactions within the territory of Vietnam. However, it has been less clear whether such foreign currency restrictions applied to price quotations and monetary thresholds, including in the context of merger and acquisition transactions between a Vietnamese entity and a foreign entity. In practice, price quotations and thresholds in a foreign currency have been commonly employed.

On March 18, 2013, the Standing Committee of the National Assembly removed this ambiguity with its broad amendments to the Ordinance. According to the amended Article 22 of the Ordinance, "[w]ithin the territory of Vietnam, all transactions, payments, listings, advertisements, quotations, pricing, and recording prices in contracts and agreements and other similar forms of residents and nonresidents must not be effected in foreign exchange except for cases permitted by the regulations of the State Bank of Vietnam." As amended, the Ordinance prohibits "quotations, "pricing" and "recording prices" in a foreign currency. A draft circular to be issued by the State Bank of Vietnam in the final quarter of 2013 with an effective date from January 1, 2014 will provide further guidance on these restrictions.

Within the context of merger and acquisition transactions, which do not appear to fall under the exemptions enumerated by Article 22 of the Ordinance, the legal uncertainties created by the Ordinance may have adverse, and perhaps unintended, consequences. Under Vietnamese law, if terms in an agreement violate a prohibition by law (i.e., the prohibition under Article 22 of the Ordinance in relation to referencing foreign currencies) such terms are automatically void and, consequently, subject to challenge by the counterparty, as well as collateral challenge.

In international merger and acquisition transactions in Vietnam, the foreign party is investing in a Vietnamese entity with funds raised or sourced in a foreign currency. Consequently, although the funds will be converted into Vietnamese Dong for the purpose of investing in the Vietnamese target company at the outset of the transaction, ultimately, at the close of the investment, the funds will be converted again and repatriated out of Vietnam in a foreign currency. Accordingly, foreign investors' primary concern is the rate of return they will receive in a foreign currency – not the rate of return they will receive in Vietnamese Dong. To this end, it is become customary for:

- Convertible loan agreements and convertible bond agreements to reference loan amounts, debt payments, conversion prices, and cash settlement mechanisms in a foreign currency;

- Share subscription and purchase agreements to reference subscription prices, share purchase prices, preference share dividends, put option and call option prices, and other cash settlement mechanisms in a foreign currency; and

- Shareholders' agreements to reference a foreign currency for call and put option prices, as well as for threshold amounts used to determine when approval of the general meeting of shareholders or board of directors is required for certain corporate actions (i.e., sale of assets).

Given that annual inflation in Vietnam has ranged widely and reached levels above 20% in recent years, and, moreover, that the Vietnamese Dong has witnessed single days of near double digit depreciation, the ability of Vietnamese target companies to raise international funds has been assisted by the ability of foreign investors to reference foreign currencies in merger and acquisition transaction documents. With the changes to the Ordinance, it is now clear that this practice may not continue. In the absence of any legal comfort that transaction documents may reference foreign currencies, foreign investors – at least those not deterred from investing in Vietnamese target companies – may need to create new pricing mechanisms, based on baskets of prices denominated in Vietnamese Dong, rather than relying on foreign currency references.