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International M&A and Joint Ventures Committee Newsletter

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Editor's Note:

Here in North America, we are all looking forward to the coming of Spring which, besides Spring Break and more pleasant weather, means that the Section's Spring Meeting is just around the corner. The Spring Meeting in DC this year takes place April 23-27 and includes many excellent events, including a reception at the United States Supreme Court. Act quickly, as Early Registration ends March 4th.

In this issue, we have some excellent articles discussing significant developments in corporate law in Argentina, India and the Netherlands (to name a few). Also, we have an article of general interest relating to Warranty & Indemnity insurance in M&A transactions. Thanks Hermann for this contribution, we always appreciate general interest articles relating to international M&A in addition to our regular Country Updates.

We hope you enjoy this update. Given that we are meeting in less than two months, it will be only a short time before a call goes out for new submissions as it will be our goal to distribute another newsletter just before the Spring Meeting.

Best Regards,
Gordon Cameron

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Country Updates

COUNTRY UPDATE ON ARGENTINA

New Capital Market Law

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On December 28th, 2012, the Capital Market Law Nbr. 26.831 was published in the Official Gazzette. This law derogated Law Nbr. Nº 17.811 (Public Offering Law), Decreee Nbr. 677/2001 (which established a Transparency Regime) and other related rules.

The Capital Market Law is a comprehensive regime which includes all issues foreseen in the derogated law and decrees, as well as certain innovations which will require that the Comisión Nacional de Valores (CNV - Argentine SEC) amends the regulation currently in force.

Main changes that the new regime brings along are as follows:

(a) The CNV's board shall be appointed by the Executive Branch.

(b) The CNV is granted with broad powers as the sole authorization, supervision, disciplinary and control authority, as well as market regulator, provided self-regulation of markets in hands of private entities has been eliminated. As such, the CNV shall be entitled to:

   (i) Appoint supervisors with veto right over the board of director's decisions.

   (ii) Suspend the board of directors for a 180-day term, provided the minority shareholders' or bondholders' interests are affected, according to the CNV's criterion.

   (iii) Suspend the agents' and markets' activities without prior notice, in case of lack of compliance with obligations, duties and applicable requirements, as verified by the CNV.

   (iv) Establish the requirements to be complied with by agents and markets to be authorized to operate and be registered as such.

   (v) Authorize entities to act as rating agencies, including public universities.

(c) Debt issuers are exempted from obtaining a mandatory opinion from rating agencies.

(d) Agents and the CNV shall be exempted from their confidentiality duties with respect to the information received in connection with requests from the federal tax authority, the Central Bank, the Unidad de Información Financiera (Laundering Prevention Authority) and the Insurance Superintendence.

(e) Administrative Federal Appeal Courts in the City of Buenos Aires, and Federal Courts in the provinces, shall revise CNV's decisions, replacing Commercial courts as foreseen in the derogated rules.

(f) Finally, regarding corporate governance matters, it is worth mentioning the following issues:

   (i) With minor amendments, the Capital Market Law follows the provisions of the Public Offering Law regarding conflict of interest, remuneration and duty of loyalty of directors.

(ii) The CNV is allowed to exempt PyMES (small and medium enterprises) from organizing an auditing committee.

(iii) All members of the fiscalization committee of public companies must be independent. The extraordinary shareholders' meeting with quorum and majority vote of 75% of shares entitled to vote (with no application of plurality of votes), may decide that the company be exempted from appointing a fiscalization committee provided an auditing committee is established. In this case, the members of the committee shall have the authority that the Companies' Law grants to the members of the fiscalization committee.

(iv) As foreseen in the previous regime, shareholders' agreements must be informed to the CNV. However, according to the new law, provided the information obligation is not complied with, the agreement shall be considered null and void.

(v) Tender offers and squeeze out provisions in the new law follow the regime set forth by Decree Nbr. 677/2001, but with certain amendments. While Decree Nbr. 677/2001 allowed the bylaws to exclude the listed company from the application of such provisions, the new law eliminates this option. Thus, the regime of tender offers and squeeze out is mandatory under the new regime.

(vi) The Capital Market Law authorizes the CNV to set forth differentiated public offering authorization regimes according to certain parameters, including objective or subjective characteristics of the issuers.

COUNTRY UPDATE ON CANADA

Investment Canada Act: State-Owned Enterprises

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The Canadian Government recently stated that while the country remains generally open to foreign investment, including investment on a significant scale by state-owned enterprises ("SOEs"), acquisitions by SOEs of controlling interests in the oil sands industry will be found to no longer be of "net benefit" to Canada except in exceptional circumstances. The acquisition by SOEs of non-controlling interests, including joint ventures, in the oil sands will continue to be welcome.

On December 7, 2012 the Minister of Industry announced:

- approval of both the proposed acquisition by China and National Offshore Oil Company ("CNOOC") of Nexen Inc. and the proposed acquisition by PETRONAS of Progress Energy Ltd., finding each likely to be of "net benefit" to Canada in light of the existing provisions of the Investment Canada Act and the former SOE Guidelines;

- updated SOE Guidelines, including expansion of the definition of an SOE to include not only those entities that are owned by a foreign state, but also entities that are influenced directly or indirectly by a foreign government. The updated SOE Guidelines require all SOE investors to demonstrate their commitment to transparent and commercial operations and the extent of influence by the foreign state; and

- the imminent increase in the review threshold under the Investment Canada Act for direct acquisitions of control by WTO Investors will not apply to SOE investments: once regulations are finalized (expected in 2013), the review threshold for direct investments by WTO Investors will increase to $600 million based on the enterprise value of the Canadian business, increasing over four years to $1 billion. These increases will not apply to investments by SOEs, for which the current threshold of $330 million based on the book value of assets will continue to apply.

The impetus for making the announcement was the proposed CNOOC transaction, valued at $20 billion (including the assumption of debt) and the proposed $6 billion acquisition of Progress Energy Ltd. by PETRONAS of Malaysia.

In connection with CNOOC's transaction specifically, the Minister announced that he was satisfied that the transaction was likely to be of net benefit to Canada and that the transaction meets the criteria of the Investment Canada Act, including the former SOE Guidelines. The Minister reported that CNOOC had, in connection with its application for approval of the proposed transaction to acquire control of Nexen Inc. under the Investment Canada Act, "made significant commitments to Canada in the areas of: governance, including commitments on transparency and disclosure; commercial orientation, including an adherence to Canadian laws and practices as well as free market principles; and employment and capital investments, which demonstrate a long-term commitment to the development of the Canadian economy."

The Investment Canada Act requires, generally, that the Minister review and approve any acquisition of a Canadian business over a certain size on the basis that he is satisfied that it is likely to be of "net benefit" to Canada. The Investment Canada Act spells out six factors, largely economic, which the Minister must consider. In addition, pursuant to guidelines on SOEs (SOE Guidelines) released in late 2007, acquisitions above the financial threshold by SOEs are subject to incremental review for the purposes of ensuring that the Canadian business will continue to be run on a commercial basis, with sufficient transparency and commitments to Canadian standards of corporate governance to ensure this is the case.

A number of acquisitions by SOEs have been approved under the Investment Canada Act since the former SOE Guidelines were released, including the acquisition by PetroChina International Investment Company Limited (PetroChina) of oil sands assets for $3 billion and Sinopec International Petroleum Exploration and Production Corporation's acquisition of Daylight Energy Ltd. for $4 billion. However, the proposed CNOOC transaction changed the landscape and put renewed political pressure on the Canadian government to articulate its approach to SOE investment generally. While approving each of the CNOOC transaction and PETRONAS transaction under the former SOE Guidelines, the government provided clarity that future acquisitions by SOEs will be subject to a more stringent standard

Generally, the new SOE Guidelines provide:

- Investments by foreign SOEs to acquire control of a Canadian oil sands business in particular will, going forward, be found to be of net benefit on an exceptional basis only.

- The Minister will carefully monitor SOE transactions throughout the Canadian economy in general. In particular, the Minister will closely examine:
    - the degree of control or influence a state-owned enterprise would likely exert on the Canadian business that is being acquired;
    - the degree of control or influence a state-owned enterprise would likely exert on the industry in which the Canadian business operates; and
    - the extent to which a foreign state is likely to exercise control or influence over the state-owned enterprise acquiring the Canadian business.

- Non-controlling minority interests in Canadian businesses proposed by foreign SOEs, including joint ventures, will continue to be welcome in the development of Canada's economy.
- Free enterprise principles and industrial efficiency will be considered in reviews where the investor is owned, controlled or influenced - directly or indirectly - by a foreign state.
- The Minister will be afforded the flexibility to extend the timelines for national security reviews to give the Government the time it needs to conduct careful and thorough reviews of complex proposed investments that could be injurious to national security.

The new SOE Guidelines provide greater clarity in respect of how SOEs can participate in the development of the Canadian economy, leaving the door open to certain SOE investments while at the same time constraining the potential for future investment in the oil sands industry.

COUNTRY UPDATE ON COLOMBIA

Overview - Recent M&A developments

By Jose F. Mafla, Brigard & Urrutia, Bogotá, Colombia (jmafla@bu.com.com)

Over the past few years, the number and size of M&A transactions in Colombia have continued to increase notably. Among the most important transactions announced in 2012 was the merger of Colombia Telecomunicaciones into Telefónica Móviles (a member of Telefónica Group). The resulting entity was valued at more than US$2.8 billion. The transaction involved, among others, the execution of back-stop guarantee agreements by the Colombian Government and the amendment of a long-term network and equipment lease agreement and a shareholders agreement between the parties. In order to enable the Colombian Ministry of Treasury (Ministerio de Hacienda), as a significant shareholder of Colombia Telecomunicaciones, to proceed with the transaction, the enactment of a law, a government decree, as well as other public policy documents was necessary. This transaction, besides being the second largest merger in the history of Colombia, is one of the most important corporate restructurings in the Country's recent history, with the Colombian government back-stopping obligations for an amount equal to c. US$3.1 billion. Also in this same sector, Bain Capital purchased Atento, one of the largest call centers in the world with operations in Colombia, in a deal worth US$1.34 billion. Ally Financial sold its auto finance operations in Colombia and other countries, as well as a 40 percent equity stake in a joint venture in China, to General Motors Finance in a US$4.8 billion transaction. In the financial sector, Corpbanca, from Chile, acquired 91% of Helm Bank's shares and an 80% equity stake in Helm's insurance unit for a total of US$1.28 billion, thereby becoming the sixth largest bank in Colombia. Finally, Cencosud, one of Chile's largest retailers, as part of its international expansion plans acquired Carrefour's assets in Latin America, including Colombia, for US$2.6 billion. These transactions, among many others which occurred during the past year, highlight the strong increase of foreign direct investment coming into Colombia. In the past years, the country has emerged as a significant economy and a growing market with great appeal to foreign investors. Evidence of this is found in the World Bank's Doing Business Rankings which ranked Colombia as the sixth most protective country for the benefit of investors. Furthermore, the Colombian Central Bank issued a communication announcing that certain measures will be taken to maintain a healthy exchange rate, as well as the lowering of interest rates to further strengthen the Colombian economy.

At the same time, the International Monetary Fund (IMF) recently praised Colombia for its ability to withstand the economic crisis of the past years, and complimented the stability of the country's credit institutions. The IMF also indicated that the Colombian banking system is well capitalized and profitable. On 2012, approximately 10 new financial institutions entered the Colombian market.

Regarding the legal environment, a new Tax Reform entered into force on January 1, 2013, and such reform included provisions relevant to M&A transactions. Notably, the capital gains tax –regardless of the type of fixed asset transferred, including shares- was reduced from 33% to 10%, which, along with other relevant tax rules, will certainly impact on tax planning structures for future transactions. Additionally, a new Civil Procedure Code was issued this year, and the new Code now permits the issuance of injunctions for shareholders to comply with their obligations arising from shareholders' agreements. Additionally, the Superintendence of Companies issued certain opinions relevant to M&A operations, namely that a Colombian company cannot be transformed into a branch of a foreign company, and a new ground for dissolution of certain types of companies, whenever there is evidence of lack of intent on the part of shareholders to remain in the company.

COUNTRY UPDATE ON GERMANY

Extraordinary Termination of Profit and Loss Participation Agreements (Organschaft) New Civil Court and Tax Court Decisions

By Ralph W. Hummel, avocado law, Frankfurt, Germany (r.hummel@avocado-law.com)

Background

Under German corporate and trade tax law, a group taxation ("Organschaft") requires the conclusion of a profit and loss participation agreement (PLPA) between a parent company and one or more of its subsidiaries which must be properly executed for a minimum period of five years. Early termination will usually result in a retroactive disallowance of Organschaft and thereby in substantial negative tax consequences. However, German tax regulations provide for certain qualifying reasons for an extraordinary termination prior to the end of the 5-year period without any negative effect on Organschaft for the period completed so far. One of the accepted reasons is a sale of an Organschaft subsidiary. However, due to different legal requirements under tax and corporate law, early terminations in case of the sale of a subsidiary require proper planning under both, tax and corporate law in order to avoid that the intended effect of a saving of the Organschaft for prior years is jeopardized. For example, it is highly recommended to clearly stipulate the sale of a subsidiary as a reason for an extraordinary termination in the PLPA since other than the German tax regulations, German case law on the corporate law requirements would usually not allow for such an early termination unless clearly specified in the PLPA. With the two court decisions described in more detail below, both, a civil law court as well as a tax court have now put certain limitations on the justification of an extraordinary termination due to the sale of a subsidiary.

Decision of the Higher Regional Court of Munich (OLG München) of June 20, 2011 (31 Wx 163/11)

A PLPA has been agreed for the required 5-year minimum but it provided for the possibility of an extraordinary termination for cause in case of insolvency (bankruptcy) of one of the parties, gross negligence or intentional contract violations, or if more than 50% of the shares in the Organschaft subsidiary were transferred to a third party. After two years, the sole parent of the subsidiary resolved on the dissolution of the subsidiary and on the same day terminated the PLPA with reference to the dissolution resolution with immediate effect for cause. With an additional separate termination letter, the parent also based the termination of the PLPA on the argument that its own financial existence would be at risk if the PLPA would be continued due to the expected substantial losses during the upcoming liquidation period. The commercial register refused to register the dissolution resolution and argued that the dissolution of an Organschaft parent if resolved by its sole shareholder would not justify a termination for cause.

The OLG München confirmed the commercial register's rejection. It laid out that an extraordinary termination requires that the continuation of the PLPA needs to be unacceptable to one or both parties and that would not be the case if the sole shareholder without obvious justifying reason resolves on the subsidiary's dissolution. As to the second termination, the court agreed that – as suggested in legal literature – the threatening of financial destruction might justify an extraordinary termination. However, those requirements would by far not be met as the losses from a PLPA are generally foreseeable and constitute a typical risk for an Organschaft parent. The OLG München did not see any reason why the losses in the relevant years would not have been foreseeable at the time of the conclusion of the PLPA and argued that especially a sole shareholder would be in the position to substantially influence the financial success of its subsidiary.

Decision of the Tax Court of Lower Saxony (FG Niedersachsen) of May 10, 2012 (6 K 140/10)

In this case, the PLPA between two corporations provided for an extraordinary termination in case of the sale of the shares in the subsidiary. After less than two years, the parties of the PLPA agreed on an amicable termination as of the end of the fiscal year. Thereafter, the Organschaft parent sold its shares in the subsidiary to the German holding company of the group. That holding company was (indirectly) held by the ultimate parent company in the UK through a Dutch interim holding. The restructuring was based on the argument that otherwise a negative tax impact from the applicability of the UK rules for controlled foreign companies (cfc-rules) could not be avoided. In a tax audit of the Organschaft parent, the justification for an early termination for cause was denied and the Organschaft was treated as non-existing right from its beginning. The FG Niedersachsen confirmed the tax audits' view and denied the existence of a qualifying reason for an extraordinary termination of the PLPA. It argued that if the sale of the interests in the Organschaft subsidiary would always qualify as good cause, the minimum period of a PLPA within a group of companies would be in the full discretion of the members of that group. That would contravene the legislature's decision to require a minimum period of five years to avoid a switching in and out of Organschaft at any time.

Also the negative consequences from the applicability of the British cfc-rules was not regarded as a reason for an extraordinary termination. The court argued that even at the time of the conclusion of the PLPA, the overall tax burden of the group which is one of the major requirements of the applicability of the cfc-rules was close to the respective ceiling. The exceeding of that ceiling was only caused by a reduction of Dutch tax rates which should have been foreseeable and not really surprising for the parties of the PLPA.

Consequences

The above two court decisions show that both, under German corporate as well as German tax laws, an extraordinary termination of the PLPA prior to the completion of the 5-year minimum period may not be based upon internal decisions to continue or discontinue a business or to restructure a group unless that results into a sale of the majority interests in the Organschaft subsidiary. It is highly recommended that prior to the entering into a PLPA, not only the potential tax savings but also the financial prospects of the subsidiaries in question including the overall tax structure of a group are thoroughly reviewed.

COUNTRY UPDATE ON INDIA

Companies Bill 2012 – A landmark legislation in the making

By Ramesh K. Vaidyanathan, Advaya Legal, Mumbai, India (ramesh@advayalegal.com)

After several years of deliberation and delay, the Companies Bill, 2012 ("**the Bill**") that seeks to overhaul the existing Companies Act, 1956 (the "**Existing Act**") was passed by the Lok Sabha (the lower house of Indian Parliament) recently. However, the Bill still awaits the approval of the Rajya Sabha (the upper house of the Indian Parliament). Once approved by both the houses and upon receiving the assent of the President of India, the Bill will be notified as a statute replacing the Existing Act.

We have sought to cull out below the key provisions of the Bill that may be of particular interest to foreign investors.

- The Bill enables formation of a new entity called 'One Person Company' ("**OPC**"). OPC means a company with only one person as its member. Under the Existing Act, there cannot be a company with only one person as its member. At least two members are required to form a private company and at least seven members are required to form a public company. Foreign companies would no longer have to go through the hassle of identifying a second shareholder entity for the Indian subsidiary merely to satisfy the legal requirement. OPCs will also be subjected to a less stringent regulatory framework.

- Currently, the provisions of Section 81 of the Existing Act that deal with further issue of share capital do not extend to private companies. Section 81 restricts the right of a company to issue shares to persons other than its members without a special resolution of the shareholders. As private companies were not covered by this provision, the board of directors of private companies had a free hand in the issue of further share capital to persons other than the existing shareholders, subject to the restrictions imposed by the Articles of Association. The Bill has deleted this flexibility available to private companies and a special resolution has been made mandatory for all types of companies.

- As per the Existing Act, an Indian company cannot be merged with a foreign company and *vice-versa*. The Bill has now permitted this with the prior approval of the Reserve Bank of India.

- Indian companies usually have a sponsoring parent holding company and intermediary holding companies which in turn undertake projects via separate subsidiaries in India. The Bill now limits this structuring flexibility. A company cannot make investments through more than two layers of investment companies, subject to certain exemptions.

- The Bill makes it mandatory for both private and public companies to appoint at least one director who has resided in India for 182 days in the previous calendar year.

- The Bill specifically provides for holding of board meetings through video conferencing or other audio visual means. However, the Central Government may prescribe certain matters that shall only be discussed at a physically convened board meeting.

- Currently, Section 169 of the Act does not specify the place where the Extraordinary General Meeting of a company can be held. Thus, several private companies, especially those that are wholly-owned subsidiaries of foreign companies, find it more convenient to hold such meetings at any place in India or outside.

  The Bill now makes it mandatory for such meetings to be held either at the registered office of the company or at some other place within the city, town or village in which the registered office is situated. This amendment will cause some practical problems to many companies.

In conclusion, the proposed changes will have a significant impact on the functioning of companies in India as it aims to take a big step towards improving transparency and regulation of business houses in India.

COUNTRY UPDATE ON NETHERLANDS

Important changes in Dutch Corporate law

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In addition to the Flex BV amendments that came into effect on October 1, 2012, the rules applicable to Dutch public limited liability companies (NVs) and private limited liability companies (BVs) have been amended as of January 1, 2013 by the entry into force of the Management and Supervision Act.

(i) Statutory basis for a one-tier board

Dutch corporate law now provides a statutory basis for the one-tier board for NVs or BVs, comprising both executive and non-executive members, as an alternative to the existing two-tier board system. Although an NV or a BV could have a one-tier board system already prior to the Act coming into effect, there was not yet an explicit statutory basis for it.

One-tier board

In the one-tier board system, the tasks within the management board are divided between the executive and non-executive members of the management board. The executive members will be responsible for the company's daily management; the non-executive members will have at a minimum the statutory task of supervising the management board members in the performance of their management duties. The general course of affairs of the company will be the responsibility of all board members, both executives and non-executives. The non-executive members in a one-tier board system are part of the management board and its decision-making process and are therefore subject to the same rules on directors' liability as executive members.

Two-tier board

In the two-tier board system, the supervisory board is a separate corporate body. Therefore, the supervisory board members have less influence on the decision-making process of the management board. A supervisory board member will as such not be responsible for the management of the company, but only for the supervision of the management board.

(ii) Conflict of interests

The statutory provisions that govern a situation where there is a conflict of interests between a management board member and the company have been amended.

Abstain from decision-making process

Under the new rules, a management board member with a conflicting interest must abstain from participating in the decision-making process with respect to the relevant matter. If, contrary to this rule, a conflicted member was involved in the decision-making process, then such decision may be nullified. In the one-tier board system, the rule applies to both executives and non-executives. In the two-tier board system, the same applies to supervisory board members and decisions of the supervisory board.

Internal effect

The Act has replaced the external effect of a conflict of interest situation (i.e. resulting in a restriction on the authority of management board members to represent the company externally) by an internal effect on the decision-making process: the conflicted member must excuse himself from the decision-making. A provision in the articles of association stating that the conflicted management board member is not authorized to represent the company in the event of a conflict of interest, as was customary in the past and is still included in many articles of association of NVs and BVs, is no longer valid. Management board members with a conflict of interest remain authorized to represent the company, regardless of any provision in the articles of association to the contrary.

Sanctions

Agreements entered into with third parties whereby the underlying corporate resolution has been adopted contrary to the new rules on conflict of interests situations can as a rule not be annulled. Only under special circumstances will a company be able to annul such an agreement or claim damages if a third party misuses a conflict of interest situation. Further, the relevant management board members may under certain circumstances be held personally liable for any damage suffered by the company as a result.

(iii) Limitation of the number of board memberships

The number of board positions that a member of a management or supervisory board of a “large” NV, BV or foundation is allowed to hold has been limited. As a general rule, a person may not be appointed as managing director of a “large” company if he or she has more than two supervisory positions with other “large” companies or foundations or if he or she is chairman of a supervisory board or a one-tier board of another “large” company or foundation. Supervisory directors will be prohibited from holding five or more supervisory positions including the “new position”. A chairmanship of a supervisory board or a one-tier board will count as two supervisory positions.

“Large” company/foundation

A company or foundation is “large” if at least two of the following conditions apply on two consecutive balance sheet dates, without interruption thereafter: (i) the net value of the assets according to the balance sheet with explanatory notes exceeds EUR 17.5 million; (ii) the net turnover exceeds EUR 35 million; and (iii) the average number of employees is at least 250.

(iv) Gender diversity

“Large” NVs and BVs are required to strive for a balanced composition of their management and supervisory boards, to the effect that at least 30% of the positions on the management and supervisory boards are held by women and at least 30% by men. With this rule, the legislator aims to increase the participation of women on the company boards of “large” NVs and BVs. This provision will lapse on 1 January 2016, but may be extended prior to this date. It does not apply to foundations.

COUNTRY UPDATE ON SPAIN

Supreme Court Decision of July 2, 2012, No. 413/2012: Nullity of pledges due to breaching prohibition on financial assistance

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The Supreme Court confirmed that breach of the prohibition on financial assistance meant nullity of the pledges. In the case examined in the Supreme Court Decision of July 2, 2012, the pledges on shares granted by a company in favor of a credit entity were declared null. The purpose of the pledges was to guarantee several loans granted by the credit entity to natural persons and to a company to acquire shares in the company itself.

After undertaking an extensive examination of the purpose of the financial assistance prohibition and of legislative evolution in the EU and Spain, the Supreme Court concluded that the transaction had to be classified as prohibited financial assistance because the company constituted the pledge on shares it owned itself, and the purpose of the pledge was to guarantee loans granted by a credit entity for the acquisition of shares in the company itself.

In application of s. 6.3 of the Spanish Civil Code, the pledges were declared null, and no restoration to the beneficiary credit entity was applicable, as they had been granted by the company unilaterally and free of charge.

SUPREME COURT DECISION OF NOVEMBER 2, 2012, Nº 635/2012: VALUATION OF THE SHARES OF A PUBLIC LIMITED COMPANY IN THE EVENT OF EXERCISING A PREFERENTIAL ACQUISITION RIGHT

This decision resolved a shareholding dispute between a large unlisted joint-stock company and several of its shareholders concerning transfer of the shares they owned and the valuation thereof.

The interest of the decision lies in the Supreme Court's examination of the possibility of reviewing and, if applicable, replacing the valuation made by the auditor appointed in accordance with the procedure for exercising a preferential acquisition right regulated in the company bylaws. The Supreme Court laid down that the valuation of the shares made by the auditor designated by the company's governing body in accordance with the bylaw provisions on preferential acquisition right could be reviewed and, if applicable, replaced by the judge.

DECISION OF THE DIRECTORATE-GENERAL OF REGISTRIES AND NOTARIES PUBLIC OF DECEMBER 19, 2012: BYLAW CLAUSE OF PRIVATE LIMITED COMPANY ON ATTENDING MEETINGS AND DELEGATING VOTES BY VIDEOCONFERENCE

This decision confirmed that the bylaw clauses of a private limited company allowing partners to attend the general meeting of the company and delegate their votes to another person by videoconference or other telematic means were registrable at the Mercantile Registry. In such cases, the requirement was that the means used ensured identification of the partners and, in the case of delegation of votes, left evidence on a recorded means or media for later use as proof.

COUNTRY UPDATE ON TURKEY

Turkish Competition Board Revised Turnover Thresholds In Merger Control Notification

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Besides the entry into force of the new Turkish Commercial Code and new Turkish Code of Obligations in July 2012, one of the most noteworthy modifications in Turkish law regarding mergers and acquisitions in 2012 is the amendments made in the Turkish merger control regime. As it will be further elaborated below, the mentioned amendments provide for a different notifiability analysis for mergers and acquisitions in Turkey.

Communiqué No. 2012/3 Amending the Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring Authorization of Competition Board ("**Communiqué No. 2012/3**"), which has made two significant amendments in Article 7 of the Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring Authorization of Competition Board ("**Communiqué No. 2010/4**"), was published in the Official Gazette dated 29 December 2012[1]. The Communiqué No. 2012/3 entered into force on 1 February 2013.

1. Amendment of Global Turnover Threshold

Article 7 of the Communiqué No. 2010/4, which is the only article that has been amended with the Communiqué No. 2012/3, regulates the turnover thresholds for parties to mergers and acquisitions that require filing with the Turkish Competition Board ("**Board**"). The turnover thresholds set out in this article have been amended as follows:

1) In a merger or acquisition transaction as specified under Article 5 of this Communiqué[2], in the event that;

a) The total turnover of the transaction parties in Turkey exceeds hundred million Turkish Liras (TL 100 million)[3] and the turnovers of at least two of the transaction parties in Turkey each exceeds thirty million Turkish Liras (TL 30 million)[4], or

b) The turnover of the assets or businesses in Turkey subject to the acquisition in case of acquisition transactions, or the turnover of at least one of the parties in Turkey in the case of merger transactions, exceeds thirty million Turkish Liras (TL 30 million)[5], and the worldwide turnover of at

[1] Official Gazette of 29.12.2012 numbered 28512.
[2] Article 5 of Communiqué No. 2010/4 ("Cases Considered as a Merger or an Acquisition") defines transactions that are considered as merger or acquisition: "(a) The merger of two or more undertakings, or (b) the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means shall be considered a merger or acquisition transaction, provided there is a
permanent change in control".
[3] TL 100 million corresponds to approximately € 44 million and US$ 56 million.
[4] TL 30 million corresponds to approximately € 13 million and US$ 17 million.
[5] TL 30 million corresponds to approximately € 13 million and US$ 17 million.

least one of the other transaction parties exceeds five hundred million Turkish Liras (TL 500 million)[6].

No amendment has been made in respect of the Turkish turnover of the transaction parties stipulated under Article 7/1(a). This threshold is still set as one hundred million TL for the total Turkish turnover of the transaction parties and thirty million TL for the Turkish turnovers of each of the at least two of the transaction parties.

On the other hand, the alternate turnover threshold set out in Article 7/1(b) which includes global turnover of the parties has been changed. This threshold was regulated under the Communiqué No. 2010/4 as (i) five hundred million TL as the global turnover of one of the transaction parties and (ii) five million TL for the Turkish turnover of at least one of the remaining transaction parties. However, the Communiqué No. 2012/3 has now amended this threshold as (i) thirty million TL for the Turkish turnover of the target in an acquisition or Turkish turnover of at least one of the transaction parties and (ii) five hundred million TL for the global turnover of at least one of the transaction parties in a merger.

Although the Board has not made an official announcement on the implementation of the Communiqué No. 2012/3, the Discussion Paper on Thresholds Set Out in the Communiqué No. 2010/4[7] gives signals of an attempt to amend the global turnover threshold. In fact, in the Discussion Paper, the Board analyses the past years' notifications and its decisions in relation thereto and declares that in 25% of the notified transactions that exceeded only the global threshold, the target did not have any turnover generated in Turkey[8]. After making a thorough empirical analysis, the Board explicitly states that the global turnover threshold is not effective in determining concentrations that might create a competitive effect in Turkey[9]. The Board also points out that transactions that exceeded global turnover threshold only constituted 60% of the transactions subject to notification and authorization and 47% of all notifications, thus creating a significant work load for the Board and negatively affecting the effective use of the Board's resources[10]. Finally, the Board evaluates this situation also as a burden for the transaction parties since they face significant costs and time loss due to these notifications[11].

Based on the foregoing, in the Discussion Paper, the Board considered it necessary to discuss whether to remove the global turnover threshold, which has proven to be ineffective for determining if a transaction would create any competitive effects in Turkey[12]. Although in the end the global turnover threshold was not completely removed, these statements might serve as a proof of how the Board reasoned while amending the global turnover threshold.

2. Abolishment of Affected Market Exception

Communiqué No. 2010/4 regulated an exception for notification requirement in the absence of an affected market in the relevant transaction. In fact, according to this communiqué, except in cases of joint ventures, authorization of the Board was not required for transactions without any affected market, even if the thresholds

[6] TL 500 million corresponds to approximately € 217 million and US$ 279 million.
[7] The Discussion Paper was published on the Board's official website on 31 August 2012.
[8] Discussion Paper, paragraph 13.
[9] Discussion Paper, paragraph 20.
[10] *Ibid*.
[11] *Ibid*.
[12] Discussion Paper, paragraph 23.

set out in Article 7 were exceeded. This exception has been abolished with the amendments made by Communiqué No. 2012/3.

Accordingly, Communiqué No. 2010/4 brings a significant amendment for notifiability analysis for mergers and acquisitions, for it enables the parties to have a clearer view on whether the relevant transaction would require notification to the Board. In fact, as a result of this amendment, it is no longer required for the parties to conduct an analysis on the relevant market in respect of the transaction before making notification to the Board. Therefore, if one of the alternate thresholds set out in Article 7 is exceeded, it is required to make the mandatory filing to the Board regardless of whether the parties to the transaction have overlapping activities or not. The Board also declared in the Discussion Paper that the removal of this exception would provide more legal stability and security for the parties[13].

Having said that, it is worth to note that this amendment is made in relation to the notifiability analyses only and the notion of "affected market" preserves its importance for the substantive competition law analysis and its place in the notification form.

Since the enactment of the amendment is quite new, we are still at the wait and see stage if the amendments made by Communiqué No. 2012/3 will create the effects aimed by the Board. Nevertheless, taking into account the empirical analyses conducted by the Board in the Discussion Paper, it would not be an overstatement to state that these amendments will most probably diminish the Board's work load and provide more legal stability for the undertakings party to a transaction.

* The views expressed in this article are those of the authors and aimed only at providing brief information on the amended Turkish merger control regime. This article does not constitute a legal document or a legal opinion or legal advice. Please do not hesitate to contact our offices should you require more detailed information on any of the issues mentioned in this article.

UNITED STATES

Delaware Courts Consider "Don't Ask, Don't Waive" Standstill Provisions

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In two recent rulings, the Delaware Court of Chancery has provided guidance on "Don't Ask, Don't Waive" standstill provisions in confidentiality agreements, particularly regarding whether such provisions comply with the Revlon duty of the target's board of directors to secure the best value reasonably available for the stockholders in a change-of-control transaction. These provisions typically prevent a bidder bound by them from taking some or all of the following actions during the specified contractual standstill period unless first invited to do so by the target's board: proposing a transaction, acquiring stock of the target, soliciting proxies, taking action that would be expected to require the target to make a public disclosure, and requesting a waiver or modification of the standstill.

The two rulings, both made orally from the bench, take differing approaches to the "Don't Ask, Don't Waive" provisions. First, In re Complete Genomics, Inc. S'holder Litig., Consol. C.A. No. 7888-VCL (Del. Ch. Nov.

[13] Discussion Paper, paragraph 26.

27, 2012) (Transcript), Vice Chancellor Laster preliminarily enjoined the target from enforcing a "Don't Ask, Don't Waive" standstill agreement that prevented the third-party bidder from publicly or privately requesting or proposing that the company or any of its representatives amend, waive, or consider amending or waiving any of its terms. The Court explained that the standstill agreement interfered with the board's duty to remain informed about relevant information pertaining to a potential sale of the company. A few weeks later, in In re Ancestry.com Inc. S'holder Litig., C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (Transcript), Chancellor Strine declined to endorse a blanket rule that "Don't Ask Don't Waive" standstill provisions are impermissible, explaining that such provisions could, in certain circumstances, serve an important role in helping secure the highest bid for a company in a public auction. The Court recognized the role of these provisions in encouraging parties to a public auction to "[g]et your best bid in now or you will be foreclosed." At the same time, recognizing that the electorate was entitled to full information about the existence of the standstill, the Court enjoined the closing of the transaction at issue pending sufficient disclosures about the standstill provisions at issue.

These recent decisions show that the Delaware courts will continue to scrutinize "Don't Ask, Don't Waive" standstill provisions and the disclosures made about such provisions. Because the Delaware Supreme Court has not provided guidance on "Don't Ask, Don't Waive" provisions, we do not know whether Delaware's highest court will ultimately agree that these provisions can be useful tools in support of auctions, or regard them as necessarily undermining a full and fair process to achieve the highest value for the stockholders in a sale of a company.

GENERAL

Warranty & Indemnity Insurance in M&A Transactions
Promised – broken – insured

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Warranty and Indemnity insurance (W&I insurance) is an instrument by which the risks, resulting from breach by a seller of the indemnity and warranty provisions in an acquisition agreement of an M&A transaction, may be assumed by a third party, i.e. the insurance company. W&I insurance protection may be purchased either by the seller ('seller-side insurance') or the buyer ('buyer-side insurance'). In case of seller-side insurance the buyer will still demand compensation or indemnification from the seller who will then seek indemnification from the insurer. Should the buyer purchase W&I insurance protection, the buyer will raise any claims she may have directly against the insurer, rather than the seller. Subrogation against the seller is then excluded. Another important distinction between the two kinds of policies is that seller-side policies do not cover fraudulent statements made by the Seller.

From an economic perspective, a seller usually bears the costs of such insurance either by paying the insurance premium or by accepting a reduction of the purchase price. Under certain circumstances the buyer may assume the cost of the insurance, (e.g. in an auction sale where W&I insurance covers risks which exceed that which a seller is prepared to accept), thus allowing the buyer to offer a higher purchase price. W&I insurance is therefore a particularly useful instrument when the costs of the insurance are lower than the reduction in price the buyer would accept in lieu of insurance. Premiums for W&I insurance range between 1 and 3 per cent of the amount of coverage purchased with a retention of around 1% of the deal volume. Since the insurance companies charge minimum premiums it is too expensive to ask for W&I insurance for transactions with a volume below approximately US$ 10 million.

A Seller may also have an interest in providing W&I insurance because he wants to improve the attractiveness of the deal. Private equity sellers in particular look to make a clean exit and liquidate the funds which have invested in the target company. Depending on the parties' negotiating positions either side may want to provide for W&I insurance. In general, buyers are keen to obtain W&I insurance if they wish to increase deal security and allay stakeholder concerns. This concern is particularly relevant in the context of an acquisition of distressed assets or situations in which the seller's financial strength is in doubt.

W&I insurance is an individually negotiated insurance contract tailored to the terms and conditions of the underlying M&A transaction. Therefore, the time period necessary for agreeing on the terms of such insurance typically extends over a period of approximately two weeks. While the process of buying coverage should be started as early as possible, often the reality is different. In many instances, W&I insurance is considered as an option only after the parties have recognized how difficult it is to overcome contrary positions they have taken concerning responsibility for risks arising from the target entity. An additional consideration for the parties is that W&I insurance protection usually requires an initial upfront-investment beyond the premium cost. This is due to the fact that preliminary risk assessment procedures must be conducted by the insurance company or the insurance broker, and need to be paid for irrespective of whether W&I insurance is eventually purchased.

Ordinarily, the parties to an M&A transaction want insurance coverage to be aligned with the terms of the acquisition agreement regarding warranties and indemnities. The so-called 'cover spread sheet' is a list of the specific warranty and indemnity provisions of the acquisition agreement and describes the extent to which coverage may be provided for by W&I insurance. This sheet is an annex to the W&I insurance policy. Already known breaches of warranty or indemnity provisions are excluded, and the insurer will require a no-claims declaration from all members of the deal team. Insurance is also available for contingent risks, e.g. litigation buy-out, tax claims and environmental liability. The parties, however, should examine carefully whether the insurer shall benefit from limitations, exclusions or non-recourse clauses provided for in the acquisition agreement in favor of the seller.

W&I insurance is a product developed in Anglo-Saxon countries. Therefore, particularly with re-spect to continental European-style contracts the parties should make sure that the definition of 'losses' in the W&I insurance policy is consistent with the compensation of damages provisions in such acquisition agreements.

In short, W&I insurance can be a valuable asset in allowing the parties to an acquisition agreement to outsource liability risks to a professional third party. It is most often an option where a seller is not prepared to accept responsibility for the pre-existing liabilities of the target entity after the transaction has closed, and instead is looking for a clean exit. Yet, there are also a variety of reasons why a buyer may be prepared to accept that a seller should not be exposed to liability with respect to all or part of the transaction after it has closed. The time required to obtain W&I insurance should always be taken into consideration, as otherwise W&I insurance may not be obtained if the timing of the transaction is not changed. Ideally the insurer or the broker would be involved at an early stage so as to avoid the possibility that there is insufficient time to obtain W&I insurance, given the time required for risk assessment procedures. Having W&I insurance in place means that the parties cannot settle warranty disputes amicably among themselves without obtaining prior approval of the insurer. The perceived cost burden of W&I insurance, the difficulties regarding the completion of the insurer's risk assessment procedures in time before signing and a certain hesitation of the parties of having a third party intervene in their contractual relationship appear to be the largest obstacles to make W&I insurance a more widely recognized instrument in M&A transactions.