Editor’s Note:

As we look forward to convening in Tokyo October 18-21, please find attached our Committee’s newsletter with updates from around the world. Perhaps this will make good reading for any of you taking a long flight to Asia!

Please note the following Committee events next week:

Committee Dinner.  The Committee Dinner will take place on Wednesday, October 19, at 8:30pm.

Committee Business Meeting.  The Nara room (in the Hilton hotel) has been reserved for us on Wednesday, October 19, from 6pm – 7pm.

Committee Breakfast.  The Committee Breakfast will take place in the Kikuen room in the hotel on Thursday, October 20, from 7:30am – 8:45am.

Committee sponsored panels include:

- **Carve Out and Lift Up – Carve-out Transactions in International M&A Transactions and Related Employment Issues**
- **Recent Trends in M&A in Asia**
- **Joint Venture and Innovation Policies in Asia: Tactical and Operational Considerations**

Best Regards,

Gordon Cameron
COUNTRY UPDATE ON CANADA

Bulk Sales Repeal Headlines Ontario’s Burden Reduction Bill
By Gordon Cameron, Stikeman Elliott (NY) LLP (GNCameron@stikeman.com) and Laura Fraser, Stikeman Elliott (NY) LLP (lefraser@stikeman.com)

The province of Ontario, Canada’s largest province and commercial center, announced on June 8, 2016 that Bill 218, the Burden Reduction Act, 2016, passed first reading in the Ontario legislature. If enacted, Bill 218 would repeal the 99 year old Bulk Sales Act (“BSA”), while also modernizing other laws affecting Ontario businesses, including Ontario’s Business Corporations Act and Personal Property Security Act.

Commercial Law Reform: Farewell to the Bulk Sales Act

Compliance with Ontario’s Bulk Sales Act can add significant costs and delay to M&A transactions structured as a purchase and sale of assets, often causing parties to rely on compliance waivers and indemnities from failure to comply as a practical, but less than ideal, solution. Ontario is the last of the Canadian common law jurisdictions to repeal its bulk sales legislation. (For U.S. readers, this trend parallels the repeal by most states of the equivalent UCC Article 6.) The purpose of the BSA – to protect unpaid trade creditors against a vendor’s bulk sale of all or substantially all of its assets – is now generally achieved through the operation of other more modern statutes.

Bill 218 also makes a small change to Ontario’s Personal Property Security Act (“PPSA”). Under the amendments as proposed, the PPSA would allow a debtor to waive, in writing, the right to receive a copy of a verification statement following the registration of a financing statement or a financing change statement. The proposed changes to Ontario’s Business Corporations Act (“OBCA”) are relatively minor and would amend the provisions on board meeting locations, board and shareholder meeting quorums, and shareholder communications.

International Commercial Conventions: Embracing International Standards

Bill 218 also provides for the amendment or adoption of several pieces of legislation relative to international commercial conventions, as follows:

- **International Commercial Arbitration Act, 2016** – this would replace the existing ICAA, affirming that Ontario law recognizes the New York Convention of 1958 as well as incorporating the UNCITRAL Model Law (the existing ICAA refers only to the Model Law, although the omission of the New York Convention is widely regarded as an oversight and has had little practical effect). This legislation also institutes a common 10-year limitation period for the enforcement of arbitral awards in Ontario under both the ICAA and the Arbitration Act, 1991, Ontario’s domestic arbitration statute;

- **International Recognition of Trusts Act, 2016** – this would implement the Convention on the Law Applicable to Trusts and on their Recognition (this Convention has been in force in all other provinces, except Quebec, for more than a decade);

- **Amendments to the International Sale of Goods Act** (including changing the Act’s name to the International Sales Conventions Act) that would pave the way toward recognition of the four-year limitation period provided for in the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention is a bolt-on to the U.N. Convention on Contracts for the International
Sale of Goods, which Canada ratified in 1992.) From a Canadian perspective, it is noteworthy that the U.S. and Mexico have been Limitation Convention states for well over 20 years;

- **International Choice of Court Agreements Convention Act, 2016** – this would give effect to the Hague Choice of Court Agreements Convention, which (subject to ratification by Canada) empowers and (generally) requires courts of Convention states to respect exclusive jurisdiction agreements, while also creating consistent rules for the recognition and enforcement of judgments from other Convention states (this Convention is currently in force only in Mexico and the EU (except Denmark), with Singapore set to join later in 2016);

- **International Electronic Communications Conventions Act, 2016** – this would give effect to the UN Convention on the Use of Electronic Communications in International Contracts, subject to ratification by Canada (this Convention has been accepted, ratified or acceded to by the Russian Federation, Singapore and a handful of other countries).

The last three of these will take effect only upon Canada’s ratification of the Conventions in question.

**Next Steps**

Having passed first reading, Bill 218 will be referred to a committee of the legislature for further review before being voted on and passed into law at a later point in the current legislative session. As noted, schedules of Bill 218 that establish legislation in anticipation of Canada’s ratification of certain international Conventions will not come into force unless and until ratification takes place.

**COUNTRY UPDATE ON FINLAND**


By Juha Koponen, Borenius Attorneys Ltd. (Juha.Koponen@borenius.com); Mark Falcon, Borenius Attorneys Ltd. (Mark.Falcon@borenius.com), and Matias Keso, Borenius Attorneys Ltd.

Year 2015 was particularly exciting in Finland for public takeovers due to two deals, which were both complex and unique in size. 2016 has so far also provided three noteworthy takeovers.

In April 2015, Nokia announced the acquisition of French-American Alcatel-Lucent in a EUR 15.6 billion exchange offer. The acquisition required SEC filings in the U.S. as well as competition clearances in the U.S., EU and China. The deal was the largest M&A deal in the history of Finland. Nokia became a nearly 80% shareholder in Alcatel-Lucent when the public exchange offer closed in January 2016. For the remaining shares, Nokia launched a public buy-out offer in September of this year, to be followed by a squeeze-out, after exceeding the 95% ownership threshold during the year and receiving clearance from the French stock market authority. However, prior to the buyout period expiration, a legal action filed before the Paris Court of Appeal requesting for annulment of the earlier clearance has caused the buyout period to be extended until further notice and the squeeze-out, originally scheduled for early October, to take place once the buy-out offer is completed.

In August 2015, Konecranes announced its “merger of equals” with the U.S. domiciled Terex through a EUR 3.9 billion combination. The Konecranes-Terex merger was unique as it would have created a new NYSE and Helsinki dual-listed company. However, while the merger was proceeding through conditions and approvals,
Chinese state-run Zoomlion in early 2016 produced two unsolicited, consecutively increasing cash bid offers (at almost double the value of Konecranes’ offer) for all of Terex’s outstanding shares. Zoomlion and Terex’s negotiations broke-down though in late May when Zoomlion was not able to produce a more binding proposal for various contested reasons, one of which was Zoomlion’s inability to arrange Chinese government-backed financing. Konecranes and Terex ended up agreeing to Konecranes’ acquisition of Terex’s material handling and port solutions business for EUR 1.126 billion, which MHPS business accounted for roughly 20% of Terex’s total sales. The last piece of the Konecranes acquisition of Terex’s MHPS business is the EU competition authorities’ condition that Konecranes divest its Stahl subsidiary located in Germany for competition clearance. This divestment is still ongoing.

Another noteworthy public takeover in late 2015 was an exchange offer by Alma Media (a publishing company listed on Nasdaq Helsinki) for all shares of Talentum (a smaller professional magazine publisher listed on Nasdaq Helsinki). The value of this tender offer was approximately EUR 40 million. Alma became the over 95% holder of Talentum shares in November 2015 after a bit of precipice parlaying with an individual shareholder holding a greater than 10% Talentum stake before the offer commenced the month before. Thereafter, Alma commenced squeeze-out proceedings for the remaining shares held by minority shareholders and was deemed owner of the remaining Talentum shares in March 2016 by the arbitral tribunal. In June 2016, the arbitration proceedings concluded with the arbitral tribunal stating that the offer price in the tender offer was the fair price for the shares in Talentum.

The public takeovers of Finnish target companies have continued in 2016 and so far they have all been cash offers by foreign offerors. This is usually the case with foreign offerors as stock consideration (without the cash alternative) would need to be listed on a regulated market within EU to be eligible as the sole consideration in a voluntary tender offer. One particular cash offer with a premium of approximately 95% was commenced by U.S. Acorda Therapeutics, Inc. with its public tender offer of Biotie Therapies Corp. (roughly valuing Biotie at USD 363 million), a dual-listed (Nasdaq in Helsinki and New York) company specializing in the development of neurodegenerative and psychiatric disorder drugs. Announced a couple weeks after the new year, the Acorda cash offer began in March, and after over 92% of the Biotie shares were tendered, a shorter subsequent offer period was commenced by Acorda in April, which was able to gather another 4% of Biotie shares for Acorda. As of end of September, Acorda was deemed holder to all shares in Biotie by the Finnish arbitral tribunal.

Another cross-border cash offer, this time from the east, commenced in April when Chinese private holding company National Silicon Industry Group offered an approximately 30% premium on shares of Okmetic Oyj (roughly valuing Okmetic at USD 200 million), a Nasdaq Helsinki listed electronic components manufacturer. Since the offer and subsequent offer period ended in early July accrued almost 97% of Okmetic shares, NSIG Finland has commenced the arbitral tribunal proceeding for the redemption of the remaining shares.

The currently pending deal is by an affiliate of a US private equity fund Madison Dearborn Partners (called Nordic Packaging and Container (Finland) Holdings Oy), which announced its approximately EUR 315 million (22% premium) cash offer for Powerflute Oyj, a Finnish company listed on the London Stock Exchange’s AIM list. Due to the Finnish company’s London listing, English law will govern the tender offer process. If all the offer conditions are met when the tender offer period closes, especially the 90% acceptance threshold, the squeeze-out procedure that follows the successful tender offer will be subject to Finnish law. This will be another interesting cross-border transaction.

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1 Premiums herein are based on the closing price of the target’s shares on Nasdaq Helsinki (or LSE Aim list with regard to the Powerflute offer below) on the last business day prior to the tender offer announcement.
COUNTRY UPDATE ON FRANCE

Major Reform to French Civil Code: Back to Civil Law!
By Raphaël Dalmas, Astura, Paris, France (rdalmas@astura.fr)

October 1, 2016 is a landmark in history of French contract law. Indeed, until this day, Napoléon’s 1804 Civil Code had remained virtually unchanged, as far as contract law principles were concerned. For instance, specific rules regarding offer and acceptance had never been addressed by the Civil Code, whether at the Code’s creation or at any time thereafter. As a result, case-law gained increasing importance over the years, to the extent that it could be questioned whether French contract law had not in fact become based on common law.

To a large extent, the reform aims at including well-established case-law principles into the Civil Code, so as to clarify the framework of French contract law. In fact, the reform aims at fostering the very principles of civil law: ensuring accessibility, and hence higher security, predictability as well as stability of agreements.

In addition, the reform also includes wholly new provisions into French contract law. We highlight below some of the new provisions which appear particularly relevant from a corporate and M&A perspective.

- **Greater contractual flexibility:** generally, the reform offers the parties a greater flexibility in the structuring of their agreements. In effect, the new Civil Code provisions are intended to simply supplement the terms and conditions of the parties’ agreements, except those provisions which are defined by the Code as public order provisions.

  - Therefore, subject to the public order limitation, parties’ agreement may freely depart from the Civil Code provisions.

- **Pre-contractual duties:** good faith expected from the parties is no longer limited to the sole performance of the agreement; it further extends to the period preceding the entry into the agreement. The new Civil Code also provides disclosure and confidentiality duties among the parties as from the negotiation phase.

  - During the negotiation phase, a party may be liable for damages on the grounds of contract liability in case of failure to either (i) disclose an important information to the other party, or (ii) keep confidential information which was exchanged. Therefore, in non-disclosure agreements, letters of intention, etc., the scope of disclosure or confidentiality obligations should be carefully defined.

- **Specific performance:** the new Civil Code provides increased certainty regarding the binding and irrevocable nature of unilateral undertakings such as undertakings included in put or call option agreements. Before the reform, when there was a breach in the performance of a put or call option agreement, there was always uncertainty as to whether the beneficiary of the option would be entitled to enforce the performance of any such option.

  - Thanks to the reform, the beneficiary of any such option may request specific performance before a judge.
Hardship: traditional case law dating back to 1876 considered that a judge was not entitled to change the terms and conditions of an agreement upon the occurrence of a non-foreseeable change of circumstances which rendered the performance of an agreement unduly costly for a party.

- From now on, either party may request from the other party (and the judge, as the case may be) to renegotiate an agreement upon the occurrence of any such event. To avoid having to face a potential renegotiation of the agreement, the parties have to specify in the agreement that they initially accepted to bear the financial risks arising out of a potential change of circumstances. This principle gives the judge an increased power as to the appreciation of the economics involved in the parties’ agreement.

Unilateral termination: the reform confirms current case law which provides the right for a party to an agreement to terminate the agreement in the event of a serious breach by the other party.

- Such right is subject to providing the defaulting party formal notice to cure the breach, and such notice remaining ineffective.

It should be noted that the reform is applicable to any agreement entered into after October 1st 2016, bearing in mind that fixed-term agreements tacitly renewed after October 1st 2016 are deemed new agreements, and therefore subject to the new rules.

Clearly, the drafting of any new agreement requires to ensure that the new rules have been duly considered.

COUNTRY UPDATE ON INDIA

India Stays The Course on Ease Of Doing Business
By Ramesh Vaidyanathan, Advaya Legal, Mumbai (ramesh@advayalegal.com)

The various departments of the Government of India have been making concerted efforts to make the Indian legal and regulatory environment friendlier to foreign businesses. The consolidated Foreign Direct Investment (“FDI”) policy that the government came out with earlier this year clearly underscored the government’s commitment to remain steadfast on the economic liberation roadmap. Another encouraging development was the introduction of the new Goods and Service Tax (“GST”) regime, which is expected to be rolled out by April 2017.

We have attempted a snapshot of the recent legal and regulatory initiatives of the government in various sectors of the economy and touched upon the significance of the new GST regime to international investments in India. We have also briefly dealt with some major deals in the M&A and JV space in India in the recent past.

Highlights of the FDI Policy

- Foreign Venture Capital Investors (“FVCIs”) can now invest in the infrastructure sector and in startups engaged in any sector. Previously, FVCIs could only invest in venture capital funds or in an Indian venture capital undertaking.
• 100% FDI has been permitted in e-commerce through the ‘marketplace model’ (Business to Business). This will be through the automatic route, which means that no prior approvals are required from the government.

• Up to 49% FDI is now permissible in the defence sector through the automatic route. Previously, this required government approval.

• Up to 74% FDI is now allowed under the automatic route in ‘brown-field’ (pre-existing) projects in the pharmaceutical sector. Previously, any investment in the brown-field pharmaceutical sector required government approval.

• The FDI policy clarifies that FDI in the manufacturing sector is permitted under the automatic route and that manufacturers can sell products through wholesale and/or retail, including through e-commerce, without any government approval.

GST: A Transformative Law

GST is being hailed as the most significant tax reform since India’s independence. A uniform law has been under discussion for several years now in order to deal with the multitude of indirect taxes in the country as different states have differing rates, laws and procedures and there were often issues of overlap leading to double-taxation. From the perspective of an international investor, cascading taxes created problems for the smooth conduct of business and escalated costs at every stage, discouraging investments in India. Once GST is implemented, foreign businesses are expected to find it easier to navigate the Indian regulatory regime and also conserve tax as well as compliance costs.

Both the new FDI Policy and the GST legislation sit perfectly well with the ruling party’s anxiety to improve the ease of doing business in India.

Some Recent International M&A and Joint Venture Deals in India

• American Tower Corporation (ATC), a NYSE listed mobile infrastructure company, acquired a 51% stake in India’s Viom Networks for a cash consideration of $439 million. The deal is seen as the beginning of a consolidation in the sector before a second wave of growth kicks in.

• Tech Mahindra, India’s sixth largest information technology services company, announced in May 2016 an agreement to acquire UK’s Target Group for $164 million. This acquisition is expected to strengthen Tech Mahindra’s presence in the banking, financial services and insurance space.

• LafargeHolcim Ltd, the world's largest cement maker, announced in July that it will sell its stake in Lafarge India to Nirma Ltd for an enterprise value of about $1.4 billion.

• In a major deal in India's private defence industry, the Reliance Group and French Rafale maker Dassault Aviation announced a joint venture in India. The new entity will be a key player in the execution of offset contracts worth about $3300 million emanating as part of the fighter jet deal.

• India’s Apollo Hospitals and Italy based KOS Group have established a JV company ApoKOS in India to address the untapped potential in medical rehabilitation services. ApoKOS is India's first complete and international standard integrated rehabilitation centre for neurological, orthopedic, cardiopulmonary, pediatric, geriatric and cancer patients.
**Conclusion**

Continuing to open up its market to foreign businesses by raising FDI limits, dropping licenses and regulatory barriers, and inviting high-tech solutions, India has moved from 142 to 130 in the World Bank rankings of countries in terms of ease of doing business. The government’s initiatives like Make in India and Digital India have also been playing a vital role in powering the Indian economy. Going by the current trend, India is well on its way to meet the International Monetary Fund’s forecast of 7.5% GDP growth in 2016, thanks to improved investor confidence, lower food prices and focused policy reforms. Besides, the government’s endeavors in building a robust and predictable taxation regime and nurturing international relations would certainly help transform India’s image from a big-but-poor economy to simply a big economy.

**COUNTRY UPDATE ON LUXEMBOURG**

Modernisation of Luxembourg Company Law
By Bob Calmes, Arendt & Medernach S.A. (Bob.Calmes@arendt.com); Fouzia Benyahia, Arendt & Medernach S.A (Fouzia.Benyahia@arendt.com)

The Luxembourg law of 10 August 2016 (the “New Company Law”) modernising the law concerning commercial companies and the Civil code represents the most significant legal reform affecting commercial companies in recent years. Luxembourg is well-known for its business-oriented legal environment and its pragmatic approach to the business world and financial markets. The New Company Law is well-aligned with this strategy where legal certainty and flexibility have been the key drivers in creating one of the most flexible corporate frameworks in continental Europe. This article outlines some of the key changes.

1 Towards more legal certainty

The New Company Law confirms and provides a legal regime for a number of commonly accepted practices, thus reinforcing legal certainty and providing more clarity.

The concept of interim dividend distribution (interim distributions decided by the management in the course of a financial year on the basis of available profits) was limited to public limited liability companies (S.A.) under the previous legislation. Most scholars, however, admitted such an interim distribution by the board of managers of a private limited liability company (S.à r.l.) given the absence of a formal legal prohibition. This practice has been given legislative backing by the New Company Law which ultimately provides for a legal regime in case of interim distributions by a private limited liability company.

The same legislative backing applies to the issuance of shares by the board of managers of a private limited liability company (S.à r.l.) within the limits of an authorised share capital set out in the articles of association notwithstanding major divergences amongst Luxembourg scholars in the past.

Likewise, the issuance of shares tied to the performance of specific underlying investments and assets (tracking shares) is now legally recognised with a complete legal regime, giving a legal basis to a practice largely admitted in practice, notably in private equity deals.
2 Towards greater flexibility

The New Company Law adapts the legal arsenal to economic realities by providing more flexibility and giving precedence to contractual freedom, allowing notably for a dissociation between voting rights and economic rights.

The issuance of non-voting shares by a public limited liability company (S.A.) is no longer limited to 50% of its share capital, and the non-voting shares no longer need to carry a preferred dividend which offset the absence of political rights under the previous legislation.

The possibility of issuing shares with a different nominal value and multiple voting rights is also introduced by the New Company Law, thus authorising the implementation of structures where key shareholders are preferred and may have dominant voting powers.

Last but not least, the issuance of bonds to the public is now admitted for all forms of companies while the listing of such bonds is still limited to public limited liability companies (S.A.).

3 Introduction of a new corporate form: the simplified limited company or société par actions simplifiée (S.A.S.)

The Luxembourg société par actions simplifiée (S.A.S.) is a new limited liability company introduced in Luxembourg by the New Company Law, inspired by the public limited liability company (S.A.), but with more flexibility and freedom when it comes to governance.

The société par actions simplifiée (S.A.S.) may be formed by one or more partners with a minimum share capital equivalent to EUR 31,000 (a foreign currency may be chosen).

The partners may freely determine the governance rules in the articles of association, provided that they appoint a chairman (président) who will represent the company toward third parties, and who may delegate its powers to one or more managing directors. With the exception of a limited number of decisions reserved by the New Company Law to the partners (i.e. mergers, dissolutions, approval of the annual accounts, etc.), the partners may freely determine the decisions falling within the competence of the general meeting of the partners or within the competence of the chairman (président). This level of freedom in terms of corporate governance has never been achieved before in Luxembourg in a corporate environment. We expect the société par actions simplifiée (S.A.S.) to be increasingly used as a joint-venture vehicle as the partners may determine the governance rules in accordance with their commercial agreement.

A transitional period applies to all existing companies which will have twenty-four months to comply with the mandatory provisions of the New Company Law.
COUNTRY UPDATE ON THE NETHERLANDS

Corporate Legislation Update
By Eva Das, Stibbe, New York, NY, USA (eva.das@stibbe.com) and Vincent van Kampen, Stibbe, New York, NY, USA (vincent.vankampen@stibbe.com)

New Legislation on Management Prohibition and Bankruptcy Fraud

On July 1, 2016, new legislation came into force that enables Dutch courts to rule, in the event of a bankruptcy, that current or former managing directors or actual policymakers cannot be appointed as managing directors or supervisory directors of other legal entities for a term of up to five years. The action can be instituted by the bankruptcy trustee or the public prosecutor in certain situations which are specified in the law, such as manifestly improper management, and in which there is personal blame of the person involved.

Based on the European directive (EU) 2015/848 regarding insolvency procedures, which entered into force on 25 June 2015 but only applies to insolvency procedures stared after 26 June 2017, the insolvency registers of EU member states will be linked. Pursuant to this directive, member states may include prohibitions as referred to above in their registers. The Netherlands is in favor thereof, so as to prevent persons from circumventing their prohibition by resuming their activities in another member state.

Also on July 1, 2016, new legislation on the criminalization of bankruptcy fraud entered into force, expanding and improving possibilities to act against bankruptcy fraud. Under the new law, certain breaches of administrative and custodian obligations can be classified as criminal offenses. Before, breach of an administrative or custodian obligation was only a criminal offense if such was done intentionally to invoke a bankruptcy and to adversely affect creditors. The latter is now no longer a requirement. Furthermore, breach of an administration or custodian obligation may now also qualify as an economic offense, even if no bankruptcy has occurred (yet).

Proposal for New Legislation on Management and Supervision Legal Entities

On June 13, 2016, a proposal for new legislation has been introduced with respect to management and supervision of Dutch legal entities. The main focus of this proposal is to unify the relevant provisions for all Dutch legal entities and not only private and public limited companies (BVs and NVs), since the most recent change of legislation on management and supervision only covered those. Under the proposed legislation, other entities such as the cooperative and the foundation will be subject to the same provisions. There will be provisions specifically catering for a one-tier board, consisting of executive and non-executive directors, in addition to the possibility to have a management board and a supervisory board (or just a management board). Also, the provisions on conflicts of interest and director liability will be aligned.

New Legislation on Filings with Dutch Trade Register

On July 1, 2016, new legislation entered into effect in respect of the manner in which documents and other information can be filed with the Dutch trade register. It can now be provided that certain documents, such as the annual accounts, can only be filed electronically. The electronic filing must be done by using one uniform standard. The mandatory electronic filing will be introduced in stages. First, it will become mandatory for so-called micro and small enterprises (≤ EUR 6,000,000 assets, ≤ EUR 12,000,000 net-turnover, < 50 employees), starting with the financial year that commenced on or after 1 January 2016. Subsequently, the same obligation
will be effective for so-called mid-size companies (≤ EUR 20,000,000 assets, ≤ EUR 40,000,000 net-turnover, > 250 employees), starting with the financial year that commenced on or after 1 January 2017. Due to developments at a European level regarding the filing of documents electronically by large companies and mid-size group companies, the effective date of the mandatory electronic filing for such companies has not been determined yet.

COUNTRY UPDATE ON SPAIN

By Albert Garrofé (albert.garrofe@cuatrecasas.com) and Idoya Fernández (idoya.fernandez@cuatrecasas.com) Cuatrecasas, Gonçalves Pereira

There have been no developments of interest in legislation in recent months because Spain’s current government has not passed any relevant bills on corporate law. In any case, we highlight two decisions by the Directorate General of Registries and Notarial Affairs (“DGRN“) on capital increase transactions.

Capital Increases Involving The Transfer Of A Branch Of Activity Or A Spin-Off Process

In its decision of July 22, 2016, the DGRN confirmed the possibility of transferring a branch of activity through a capital increase without having to fulfil a spin-off process and, therefore, without entailing a universal succession.

Since the adoption of the Structural Modifications Act, which introduced the concept of spin-offs in Spanish Law, there has been uncertainty as to whether, in a transaction to transfer an economic unit or branch of activity to a company, it was (i) possible to choose between a capital increase with the contribution in kind of the branch and a spin-off process; or (ii) necessary to carry out a spin-off process (a longer and more costly procedure). Although most commercial law doctrine defended the possibility of choosing, some commercial registries did not allow this and demanded that the transaction be carried out as a spin-off. The DGRN’s decision has settled the issue, permitting the option of a capital increase with the transfer of a branch.

According to the DGRN, as the spin-off process is not specifically required by law, the transfer of a branch of activity must be allowed as an exchange value in a capital increase provided that, by fulfilling the requirements for a capital increase with a contribution in kind, all the interests at stake are protected (those of creditors, workers and shareholders). The DGRN highlights that, regarding the contributing company’s shareholders, if a capital increase is implemented and core assets are transferred, the agreement of the contributing company’s meeting of shareholders would be required under article 160.f) of the Spanish Companies Act.

Capital Increases With Payment Certified By Foreign Credit Institutions

In its decision of September 7, 2016, the DGRN accepted that a foreign credit institution (in this case, a Swiss credit institution) can issue the certificate attesting to the cash contribution to pay for a capital increase.

The DGRN considers that the cash contribution does not need to be deposited in a credit institution qualified to operate in Spain and that, as there is no law to the contrary, a certificate issued by a foreign credit institution cannot be rejected if it (i) proves that the entity is authorized to act as a bank, (ii) is qualified to accept deposits
from the public under Swiss law, and (iii) is subject to supervision. Also, as the certificate’s content (which makes the return of the deposit conditional on the return of the certificate) guarantees the authenticity, integrity, origin and target of the cash deposit, payment is accredited in the same way as a certificate issued by a Spanish credit institution that guarantees the integrity of the share capital.

COUNTRY UPDATE ON UKRAINE

Brief Insight into Current M&A Environment and High Expectations for Significant Changes: focus on bringing foreign investors at the Ukrainian market

By Timur Bondaryev, Arzinger (Timur.Bondaryev@arzinger.ua), Anna Zorya, Arzinger (Anna.Zorya@arzinger.ua), Viktoriia Dobrynska, Arzinger (Viktoriia.Dobrynska@arzinger.ua)

The government of Ukraine has been active since the beginning of 2016 in fostering a business-friendly climate, especially for foreign investors. Nonetheless, despite parliamentary activism, recent incentives are not at all times straightforward and consistent, and sometimes reflect hard compromises between leaving the existing legal framework intact and showing some progress under proclaimed reforms.

Shifting Towards Enhancement of Protection of Investors and Recent Anti-Raider Incentives

The new law of Ukraine on protection of rights of investors came into legal force as of 1 May 2016. In terms of functioning and corporate governance of joint stock companies, the law introduced a number of novelties not yet known in Ukraine before, such as:

- derivative action granting shareholders (meeting 10% cumulative shares threshold) the right to bring claims against companies’ officials seeking to reimburse damages caused by actions or inactions of such officials;
- the concept of independent members of supervisory board (independent directors);
- significant updates on the rules and procedure for approval of significant and interest-related transactions, including the criteria for qualification of transactions as significant and interest-related per se.

One of the most debatable issues at the moment is the current situation with raiding attacks and unlawfully taking control businesses. In response to recent storm of raiding attacks, on 6 October 2016, the parliament adopted a draft law (“Draft Law”) aimed at strengthening protection of property rights in the sphere of state registration. The following are key amendments introduced by the Draft Law: the renewal of certifying requirements (i.e. notary certification) for signatures on transactional documents that result in the change of ownership to corporate rights; restricting the principle of extraterritoriality in conducting registration actions; and strengthening of criminal and administrative liability of state registrars and for the forgery of documents. Together with gradual liberalization of exchange control by the National Bank of Ukraine (most notably, allowing repatriation of dividends for the period 2014-2015), the parliament also lifted the requirements for mandatory state registration of foreign investments, which have long been criticized as a bureaucratic burden that did not provide investors with efficient benefits or guarantees.
The Government Significantly Changes State of Play for State-Owned and Municipal Enterprises: any prospects for these companies to become national blue chips?

The Law "On Introducing Amendments to Certain Legislative Acts regarding Management of State-Owned and Municipal Property" was recently enacted in Ukraine. This law establishes a set of well-recognized international corporate governance standards for state-owned and municipal enterprises. The rationale behind introducing the law is to enhance the public economy sector and minimize political interference in the operations of state and municipal entities. The law introduces the following corporate governance mechanisms: (1) a two-tier management structure, whereby a supervisory board (appointed upon resolution of authorized management state / municipal body) becomes responsible for appointing executives of the company and supervising their activities; (2) enhancing operational transparency in state-owned and municipal companies via publishing a variety of data at the official web-sites of either the companies or authorized management state / municipal bodies. Recent restructurings of national giants (such as the National Joint Stock Company "Naftogaz of Ukraine" and Joint Stock Company "Railway Transport of Ukraine") are sound examples of the efficiency of the newly-established corporate governance rules.

Significant Novelties in Merger Control Regulation

On 18 May 2016 the law establishing increased notification thresholds came into legal force, whereby merger clearance is obligatory for transactions that meet either of the below thresholds as of the end of the year preceding the merger:

1. Euro 4 million in either assets or turnover in Ukraine for each of at least two merging parties, and euro 30 million either in assets or turnover worldwide for all the merging parties aggregately; or
2. Euro 8 million in either assets or turnover in Ukraine for the target group (or one of the joint venture partners groups in case of joint ventures establishment), and euro 150 million in turnover worldwide for at least one other merging party (in most cases, – for the party acquiring control/purchasing assets/shares/stakes).

The law also envisages such important novelties as: elimination of market threshold; introduction of simplified procedure for transactions lacking effect on competition on the Ukrainian markets; introduction of preliminary consultations regarding simplified procedure application possibility; reduction of the number of reasons for in-depth investigation launch; clarification of remedies negotiation procedure, etc.

Company Law Reforms: Decisive Word in Clash of Dispositive and Imperative Approaches in Regulation

For relatively long period of time the Ukrainian market has being expecting substantial reformation of statutory framework on functioning of private companies, especially limited liability companies, which are considered the most popular vehicle for conducting businesses. Apart from being highly outdated and ambiguous, the current Law "On Business Entities" gives small space for the market players to benefit from regulating their own corporate relations. For these reasons, the Ukranian parliament is considering the Draft Law, which would shift toward a dispositive approach in the regulation of corporate relations. Following adoption of the Draft Law, we can expect that private arrangements of the participants may carry weight in terms of their enforcement, thus making the management of the business vehicles much flexible and predictable. Beyond this, it may be also highly advantageous for conducting M&A and JV transactions in Ukraine.
COUNTRY UPDATE ON THE UNITED STATES

Capital Acquisition Brokers: A New SEC Registration Category Providing Clarity and Relief for M&A Brokers
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Securities brokers conducting business in the United States, generally referred to as broker-dealers, are required to be registered with the U.S. Securities and Exchange Commission (the “SEC”) pursuant to the requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), although limited exceptions might apply to non-U.S. broker-dealers who are in compliance with certain Rules adopted by the SEC. Companies and individuals that limit their activities to mergers and acquisitions and private capital raising advisory services often find SEC broker-dealer registration costly and burdensome. Such companies and individuals instead have acted as “finders” who are not required to be registered with the SEC. Determining whether a person is acting as a finder or a broker-dealer is often challenging, and erring in the determination and failing to register with the SEC can have significant adverse consequences to the finder, including SEC enforcement proceedings.

A “broker” is defined in the Exchange Act as “any person engaged in the business of effecting transactions in securities for the accounts of others.” A “dealer” is defined as a person that is “engaged in the business of buying and selling securities…for such person’s own account, excluding a person that buys and sells securities for its own account, but not as part of a regular business.” On the contrary, the federal securities laws do not define the term “finder.” To determine whether a person advising on a M&A transaction, or on a capital raising transaction, is operating solely as a finder, or whether that person has crossed the line and strayed into broker-dealer territory, with the potential adverse consequences noted above, it is necessary to become familiar with guidance provided by the SEC through various no-action letters and in other releases and commentary. What is clear is that a finder cannot receive transaction-based compensation without being at substantial risk of SEC enforcement action.

On January 31, 2014, the staff of the SEC issued a no-action letter (the “M&A Brokers’ Letter”) stating that it would not recommend enforcement action if a “M&A Broker” were to engage in the activities described in the no-action requesting letter in connection with the purchase or sale of a privately-held company without registering as a broker-dealer under the Exchange Act. The requesting letter described ten activities proposed to be engaged in by the M&A Broker, including that the M&A Broker must not provide, directly or through an affiliate, transaction financing, that no public offering of or sale of securities can be involved in the acquisition, that if a group of buyers is formed for the acquisition, any such group must be formed without the assistance of the M&A Broker, and upon completion of the transaction, the buyer must control and actively operate the target company.

Because of the limitations enumerated in the M&A Brokers’ Letter, which in practice have proven to be too restrictive for many market participations, and the uncertainty with respect to the issue of whether broker-dealer registration is required for finders or others advising on raising capital or who facilitate sales and acquisitions of businesses, the Financial Industry Regulatory Authority (“FINRA”) proposed, and the SEC approved on August 18, 2016, a FINRA rule creating a new category of broker-dealers known as Capital Acquisition Brokers or “CABs.” A CAB is essentially a broker-dealer that limits its business to M&A advisory work and/or corporate financing transactions, and as such the regulatory burdens of full SEC registration are significantly lessened.
CABs may advise on M&A transactions and on capital raising activities, including assisting in the preparation of offering materials for the sale of securities, providing fairness opinions, assisting in negotiating and structuring M&A transactions, and receiving transaction-based compensation for such activities.

It remains to be seen whether the new CAB registration category provides sufficient relief from full SEC and FINRA broker-dealer registrations to encourage firms that limit their activities to investment banking to register as CABs, or whether the constraints on what business may be conducted by a CAB results in relatively few broker-dealers taking advantage of and registering under this new CAB registration category.