Expert Guide

Mergers and Acquisitions

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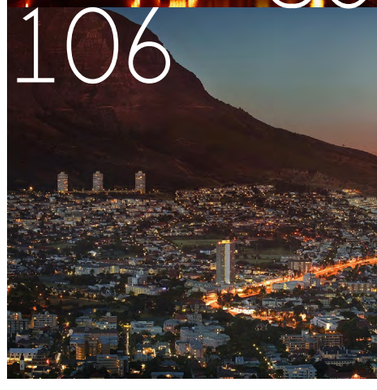

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Introduction

By James Drakeford

Worldwide M&A activity has seen a steady improvement in the first quarter of 2013, with an increase in 10% - leaving reason to be cautiously optimistic for the future after the disappointing year of 2012 which saw M&A fall 2.5% in value terms from 2011.

The stop-start nature of 2012 meant that global activity levels were continually subdued despite a slight upturn in the final quarter of the year. The volume of deals fell 4.3% from 2011, to 12,568 deals with transactions totalling $2,177 billion. Once again the most active sector for M&A transactions was energy, mining and utilities with 26% of all global activity here.

Other heavily invested sectors included the emerging and high-growth markets accounting for 23% of global M&A – an increase of 5% from 2011.

The final quarter of 2012 saw some reason for positivity and the first quarter of 2013 has rewarded that optimism slightly but any sign that a recovery was imminent have subsequently been calmed. One of the biggest deals of Q1 was the acquisition of Heinz by 3G Capital and Berkshire Hathaway for $28 billion allowing some reasons to be hopeful.

Deals over $5 billion have accounted for 31% of M&A while the value of worldwide M&A totalled $542.8 billion, with over 8,100 worldwide deals announced during the first quarter of 2013, a 16% decline from a year ago but the increased value of transactions softens the blow somewhat.

America is beginning to make strides towards a more productive M&A market and although the aggregate value of M&A slipped, there were three mega deals such as the $24 billion leveraged buyout of Dell and Liberty's Global $23 billion acquisition of Virgin Media, which all points to an economy which is beginning to find its feet with higher risk financing.

M&A deals in the US are up 31% on the same period last year and there is also a committed focus on reaching emerging markets in the country. This only bodes well for future M&A growth as investors gradually begin to compete once more. The mammoth continent of Asia has all the right ingredients to see a rise in activity, but is still going through some difficulty. Asia has a hit a two-year low in terms of value and volumes at the start of the year, while volume declined a 39% quarter on quarter.

This is in part down to the failing Japanese Yen and the fact Japan has enjoyed a splurge on overseas M&A's in recent years and is now taking breather, with outbound M&A dropping by 67%. However, economic growth is resilient in this region and deal interest remains strong especially in Singapore, Malaysia and Indonesia. Many deals will be intra-regional, and interested outsiders tend to come from Japan and Europe.

The ever growing Indian economy has attracted a large number of investors, particularly companies that are serving Indian consumers. This can be attributed to India's annual retail sales of $500 billion and an economy driven by domestic consumption, rather than exports which sees global brands eager to invest – particularly when there is a strong and emerging middle class.

The growth in level of M&A activity in India is evident from the fact that National Stock Exchange India was the world's largest stock exchange in terms of number of trades in equity shares in 2012 (USD 1.4 billion) followed by New York Stock Exchange (USD 1.37 billion) and NASDAQ (USD 1.26 billion).

China was another country which faced difficulty in the past year, mostly as a consequence of being impacted by several other circumstances which included the flight of capital, unstable inflation, rising cost of wages and a still-unclear regulatory approval system and collapsing black market loans which have lead to muted investment interest in China.

M&A activity in Europe has continued to lag but once again, there are reasons for positivity with corporate debt as a share of earnings is at its lowest since the late 1980s and potential target companies are now relatively cheap.

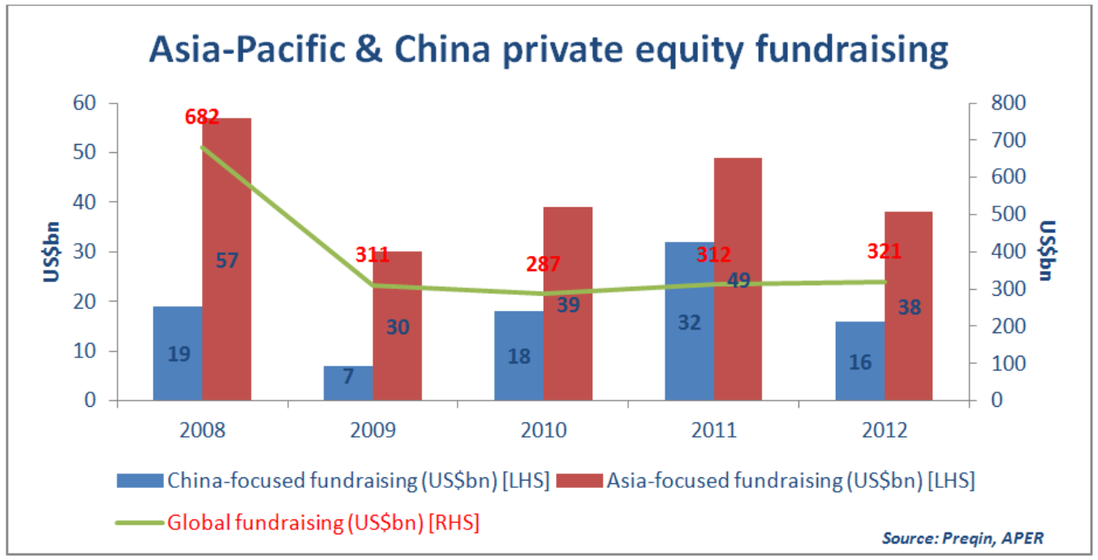
Part of the explanation behind low activity in Europe can be pointed to the fact that firms are using this period of ultra-low interest rates to pay down debt, therefore roots for a potential future boom in deals is very much a possibility.

The difficult economic challenges which face many firms today are forcing big businesses to be cautious and patient. Traditional M&A strategies are not as reliable as they once were so it is increasingly apparent that shareholders must be creative and innovative while investing.

Throughout this guide we take a look at the latest developments from around the world and find out how organisations can change and adapt their methods and strategies in order to continue producing positive results in the present steady landscape.

Deloitte China Private Equity Overview – 2012

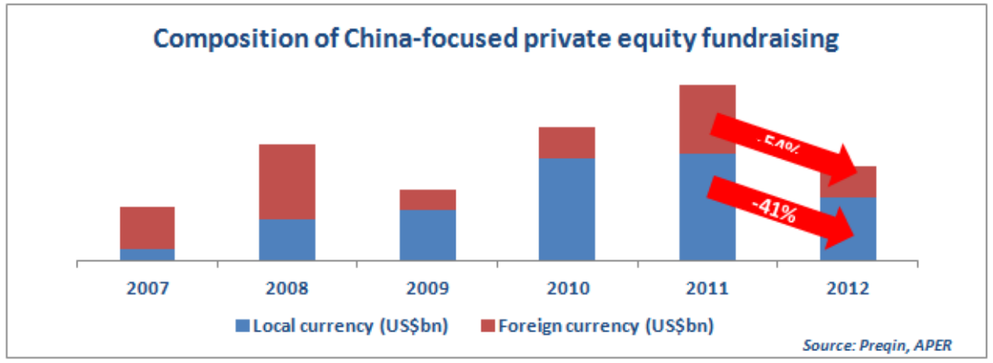
By Stanley Lah



You would have to have been living under a rock for the past year to believe that the private equity fundraising environment in China was anything better than poor over 2012. Metrics assembled by private equity database provider Preqin and Asia Private Equity Review (APER) show that just US$16bn was raised by China-focused funds over the twelve-month period – half what was raised in 2011. In comparison, the asset class raised US$321bn globally, up 3% from the previous year.[1]

Furthermore, this fall comes despite the fact that more than 50% of those Limited Partners LPs who invested into the Asia-Pacific region originated from China[2]. Given that anecdotal data from Preqin shows that regional LPs tend to invest within their region [3] and that the amount of RMB to US$ funds raised over 2011 and 2012 showed a 55% drop in non-local currency fundraising, the figures suggest that foreign private equity players are increasingly looking at regions apart from China to deploy capital.

> *"GPs remain dubious about forward-looking forecasts, anticipate that growth will remain slower than in the past and worry about overpaying for deals. With billions in dry powder earmarked specifically for investment in China at the outset of 2012, and more capital in the hands of regional or global funds that could be put to work there, PE funds faced challenges deploying capital. At the same time, Foreign PE funds continued to face regulatory obstacles to investment despite some recent easing of restrictions."*
> ***Bain & Company Global private equity report 2013***



The reasons that could explain this large fall are numerous. First and foremost is the difficulty in exiting a Chinese investment, as well as the current uncertain macroeconomic, and political environment. The well-known HSBC China PMI index, which many consider to be the economic barometer of the Chinese economy illustrates this uncertainty all too well, with the index having become increasingly volatile over recent months. Such pessimism has meant that unless motivated by other, non-profit-related drivers, investors, by and large turned their backs on China over 2012.

Investment Activity

Against this bearish fundraising backdrop, Chinese private equity investment activity over 2012 was fairly stable, with some US$17.4bn being invested, a 1.1% decrease from the previous year. However, it should be noted that a sizable proportion of this was due to a consortium consisting of Boyu Capital, China Development Bank Capital, China Investment Corporation (CIC) and CITIC Capital Partners, among others, initiating a share buyback in Alibaba, which saw them invest US$7.6bn into the business. If this particular transaction is discounted from the analysis, overall private equity investment in China over the course of the year fell by 44% in terms of valuations. From a volume perspective, it also declined from 372 transactions to 228 deals, a fall of 39% year-on-year.

It should be noted though, that other state-owned investment vehicles made investments over 2012, with sovereign wealth fund CIC making its first forays into Russia via investments into OJSC Urakali and Russian Forest Products Group, as well as setting up a joint venture with the Singaporean sovereign wealth fund GIC in order to allow Cheniere Energy Partners to begin construction of the USA's first LNG export plant in a decade. China's National Council for Social Security Fund also had a busy 2012, participating in two domestic transactions (a US$1.6bn investment into China Cinda Asset Management and a US$182m investment into CCB Life Insurance).

The downturn in general investment activity over the course of the year could partially be explained by the simple fact that there was too much capital chasing too few good-quality assets. According to Bain[4], the amount of capital (or in the asset class's parlance, 'dry powder') that the global private equity industry had to spend stood at just under US$ one trillion in June 2012, with China-focused firms' dry powder standing at some US$59bn at the end of the year.

And if this wasn't enough of a pressing issue, China-focused GPs also have to contend with the fact that they face a growing amount of competition from the corporate sector. According to a recent Baker & Mackenzie private equity report[5] which surveyed business owners and entrepreneurs across the Asia-Pacific region, twice as many respondents stated that they would prefer to sell to corporate, as opposed to a private equity buyer.

All of which means that China-focused funds are finding it more difficult to deploy capital effectively.

However, the good news is that they are increasingly adopting new creative methods in order to circumnavigate this issue. For example, many private equity investors are looking to partner up with other counterparties in order to get deals through the door. As a result, club deals between local and foreign GPs are on the rise. According to APER[6], over 2012, the aggregated amount invested in such joint-venture-type transactions was US$10.2bn – some US$4.4bn more than the year previously.

Exits

From a global standpoint, the private equity industry's inability to divest its collective portfolio is fast becoming the largest issue facing the asset class. According to Mergermarket's Monthly M&A Insider April 2013 edition, over the first three months of 2013, less than 300 private equity exits, cumulatively worth approximately US$130bn, were undertaken across the globe – roughly the same number that were undertaken in Q1 2010 in the aftermath of the collapse of Lehman Brothers.

The news from China is not much better either. The recent spate of overseas accounting scandals continue to dog overseas listings while local equity market conditions remain poor, both meaning that the current backlog of Chinese companies looking to IPO – currently 900 and counting – is unlikely to be cleared anytime soon. Indeed, one study conducted by China First Capital[7], a boutique investment bank, suggests that the asset class will need to exit around 7,500 investments, worth an aggregated US$100bn as the current round of the private equity investment cycle comes to an end.

The issue is compounded by the fact that the more than half of private equity practitioners at the recent SuperReturn International conference, held earlier this year, believed that the current private equity investment cycle is likely to peak in or before 2015 – an especially pressing issue for Chinese GPs, who, CITIC Capital Chief Executive Yichen Zhang believes, promised high returns and unrealistic delivery timeframes during the previous buyout phase of the cycle. As a result, he portends, around 80% of the country's smaller GPs are likely to collapse in the coming years.

What industry experts believe this will mean is that the majority of private equity firms with Chinese portfolios will increasingly look to exit their investments via the secondary market so as to return capital to LPs as well as limit the amount of due diligence, operational improvement and compliance work they have to complete as they look to round off their upcoming vintages.

However, this grand rotation is unlikely to be a painless process. First off, there has never been a single RMB-denominated secondary buyout primarily because there are no willing buyers at the moment – a belief that is hindered by the fact that foreign buyers are precluded from this particular market by Chinese regulators. Indeed, one GP at a locally-based private equity house went so far as to say that foreign investors had to 'climb through hoops' in order to be able to conduct a secondary buyout.

Summary

In conclusion, China-focused funds are likely to face a plethora of issues to deal with if they are going to be able to make a meaningful return for their investors. According to a number of sources, China-focused GPs and LPs are certainly more bearish on the industry's collective ability to make future investments now than they were 12 months ago[8]. Indeed, according to a recent survey conducted by Preqin in December 2012, the proportion of investors who believed that China was the most attractive emerging market to invest in fell two percentage points year-on-year to 31%.

At the same time, this fall in investor confidence belies a general improvement in global sentiment. Indeed, in the same survey conducted by Preqin, the proportion of investors who felt that their PE investments had fallen short of expectations fell three percentage points to 16%.

However, despite the generally dark mood that is pervading the market at the moment, there are glimmers of hope. Deals, such as Lunar Capital's recent US$50m acquisition of Yonghong, a processed beef products manufacturer, and Standard Chartered Private Equity's recently-announced cooperation agreement with Guangdong-based Aiyingdao Children Department Store, a maternity wear retailer, both indicate that GPs are still bold enough to transact despite the gloomy macroeconomic sentiment. At the same time, Unitas Capital's exit from Exego Group, an automotive replacement parts distributor, for a reported 1.6x return, all demonstrate that the overall situation remains fluid and that certain niche investments remain profitable.

So, in a final assessment of whether the private equity glass is half empty or half full, it is clear that a new investment theme is now taking hold across China-focused private equity funds. The days of minority stake investments are increasingly being replaced by control transactions, where private equity investors can really look to make operational improvements in an underlying business. True to the adage that a rising tide lifts all boats, previous wider market bullishness enabled GPs to make outsized returns on their investments with very effort on their behalf. Now, strategic considerations are most definitely at the fore of any GPs' mind as they look to squeeze every last ounce of efficiency out of their holdings.

The final corollary of this is that doing a PE deal in China in this 'new normal' will become a more time-intensive process. Due diligence processes will elongate as GPs look to scrutinise every facet of a potential business before investing – a process that becomes all the easier GPs look to share the load. Given this, club deals could become more commonplace going forward, meaning that choosing any potential partner will also become an increasingly crucial factor within any transaction.

In summary, investment sentiment remains broadly positive although China-focused funds need to stay nimble if they are likely to stay profitable over the years to come. The outcome of the upcoming listings of Sinopec Engineering and China Galaxy Securities on the Hong Kong Stock Exchange could act as a litmus test to gauge whether or not a local IPO exit route is open, while wider fundraising fundamentals across China continue to remain strong. However, this should give no cause to become complacent – a quarter of LPs interviewed by Preqin believe that the biggest challenge facing GPs over 2013 is global macroeconomic uncertainty; a seven percentage point rise from the year prior. So while sentiment remains positive, the outlook continues to be murky.

Stanley is a Partner in our China M&A Transaction Services practice and is also the Private Equity Leader for Deloitte China. Stanley has worked with Deloitte for 17 years, spending more than a decade of this advising the firm's private equity clients in China, the wider AP region, as well as the in US.

Stanley has broad experience in advising both financial sponsors and strategic buyers on financial due diligence, accounting structurings and other advisory services. He continues to handle investments across the whole private equity investment cycle, from growth capital investments and buyouts, to divestitures and take-private transactions.

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1 - Bain 2013 global private equity report
2 - APER 2012 review
3 - Preqin private equity investor outlook, H1 2012
4 - Bain 2013 global private equity report
5 - Baker & Mackenzie 'Adapt & Grow' 2013 private equity report
6 - APER 2012 review
7 - China Secondaries Investment Universe, China First Capital
8 - Bain 2013 global private equity report & Preqin Investor outlook, H1 2013

Cross Border Deals

By Vandana Shroff & Smruti Shah

The advent of globalisation in general - and a shift of economic power to the emerging economies in particular - has led to a huge spurt in cross-border activity over the past two decades. By definition, a cross-border deal will involve at least two jurisdictions. However quite often, the number may be much bigger as the companies involved may have operations all over the world.

While traditionally, deals were more common between European and North American companies, there is a shift in trend to more deals being focussed on the emerging markets in Asia, Africa and Latin America. Although the recent economic crisis might have reduced the resource pool and the risk taking capacity of the traditional players, cross-border transactions have continued without much disruption, albeit perhaps with altered motivations. Companies are now more keen on distributing their geographical exposure more widely, with the dual aim of achieving higher growth and containing risks.

Being part of what is described as the BRICS grouping of emerging economic powers; India has been witness to increased cross-border deals despite the global economic crisis. Although there are perceived fears arising from uncertainty of the tax position resulting from the Vodafone dispute, the M&A landscape in India has not been significantly marred.

The value of M&A deals involving India rose by 12% in 2012, reaching an aggregate value of US $ 43.4 billion. The figures were driven by the merger of Sesa Goa, a 55%-owned unit of Vedanta Resources, with Sterlite Industries in a deal valued at US$3.9 billion, the largest M&A transaction of the year with a significant Indian element. Also, Indian companies are more confident acquiring overseas companies with Indian acquisitions overseas rising 12% with an aggregate deal value of US $ 11.6 billion. However, the trend of foreign firms acquiring Indian companies has declined 23% to US $ 15.3 billion over the same period. This perhaps reflects the relative strength of the Indian economy which has been somewhat less affected by the global economic crisis than many of the western countries.

Although there may be many different motivations and concerns behind cross-border transactions, the following seem to be common to most:

- Companies are keen to benefit from economies of scale and thus reduce production and management costs
- Companies want to benefit from achieving greater synergies
- Companies are becoming increasingly wary of overexposure to any particular jurisdiction, and want to expand geographically to pervade into the trans-national space
- Some transactions are designed to acquire a competitive advantage over rivals, although these may lead to competition law issues, and would hence require additional legal input
- Companies want to acquire valuable intangible assets such as key employees, intellectual property or technology

Despite these, it is also worth noting that most cross border M&A deals do not achieve economic success at least in the short term. These may arise due to a variety of reasons including inadequate due diligence, and a general lack of awareness of the underlying cultural, political, legal, and regulatory issues. Company executives tasked with making M&A decisions will need to be sensitive to the local issues that may impinge on the long term success of the deal.

They must be satisfied that the deal is likely to create higher value. They will also try to quantify this value, and will have to work out the timeframe over which this value be realised. Also, the company will need to be comfortable that the deal will lead to synergies which will make the combined entity more successful than the individual units. Equally important is having a realistic assessment of the risks involved, and a plan to effectively manage such liabilities. This will require extensive and informed due diligence.

Legal & Regulatory Issues

Despite efforts being underway to achieve some form of uniformity in legal processes for cross-border transactions, there are wide differences in areas of corporate, competition, taxation and security laws, amongst others. For example, a foreign company acquiring an Indian company will be required to comply with the Takeover Code and also follow the guidance and limits imposed by the foreign exchange regulations.

The regulatory roadblocks in doing business in India, such as the legal regime governing takeovers, competition law, and FCPA/ UK Bribery Act is still evolving. Furthermore, the basic company law in India is all set to undergo complete revamp with the Companies Bill, 2012 being passed in the Lok Sabha (the lower house of the Parliament of India) and which is now pending with the Rajya Sabha (the upper house).

As far as dispute resolution is concerned, the recent Supreme Court decision overruling *Bhatia International* which makes international arbitrations immune from parochial interference by Indian courts comes as a relief, however, the Supreme Court does seem to have thrown the baby out with the bath water by ousting the jurisdiction of the Indian courts to grant interim relief as well.

Given the fast paced change in the regulatory landscape in India, adequate legal advice on local law specific points to ensure that the deal is valid and enforceable in the jurisdiction in question becomes critical. The differences in the legal and regulatory framework may also lead to changes in the nature and depth of the due diligence process. These legal complications become even more pronounced if the transaction involves several jurisdictions as lawyers will have to be engaged in each jurisdiction leading to increased legal and administrative costs.

Cultural Issues

Another important parameter that is often ignored when formulating M&A strategies is the relevance of the underlying cultural issues. Work ethics and even corporate structures can vary significantly across different jurisdictions. Even among countries with seemingly similar cultural values, huge cultural differences can exist in areas such as office etiquette, communication styles, human resources policies, expected working hours etc. For example, many large Indian businesses are family-owned with a central decision making authority usually headed by the patriarch or a family-controlled board. Although the boards will almost invariably have professional non-family directors and other officials, the interests of the family will affect business decisions. Lack of awareness of these cultural issues may result in disaffection and will eventually lead to economic losses. These cultural issues can also have a detrimental effect in the working conditions of the employees who are used to a different management style.

Political Issues

Ignorance of the political matrix may lead to undesirable economic consequences if and when the political equations result in adverse changes in the legal and regulatory landscape. As an example, while foreign direct investment in the retail sector has been recently allowed, given the extensive lobbying, this has been allowed subject to complex conditions attached to the policy. Other hurdles such as states getting the power to say yes or no to retail, have kept global players from making any announcements so far and a lot depends on the outcome of the 2014 elections.

Conclusion

Cross border deals in India is set to see exponential growth. The GDP growth has eased lately, but is expected to recover. While fiscal slippage, high inflation and socio-political issues continue to remain challenges, the strengths of the Indian market lie in the sheer GDP size, the private equity houses remaining active in India, recent regulatory changes to boost inbound investment (such as foreign direct investment now being allowed in the retail and the aviation sector) and the huge attraction for investment in the infrastructure sector.

Cyril Shroff is a Managing Partner of Amarchand Mangaldas India's largest and foremost law firm with approximately 700 lawyers and has offices at Mumbai, New Delhi, Bangalore, Kolkata, Hyderabad, Chennai and Kolkata.

With over 31 years of experience in a range of areas, including corporate laws, securities markets, banking, infrastructure and others. Mr. Shroff is regarded and has been consistently rated as India's top corporate, banking and project finance lawyer by several international surveys including those conducted by International Financial Law Review (IFLR), Euromoney, Chambers Global, Asia Legal 500, Asia Law and others. He has won numerous awards from Legal Publications.

Mr. Shroff has authored several publications on legal topics. He is a member of the Advisory Board of the Centre for Study of the Legal Profession established by the Harvard Law School, and a member of the Advisory Board of the National Institute of Securities Markets (NISM).

He is a member of the Media Legal Defence Initiative (MLDI) International Advisory Board. Mr. Shroff is also part of various committees of the Confederation of Indian Industry (CII) - the National Council on Corporate Governance, the National Committee on Capital Markets, Private Equity & Venture Capital, Commodities Markets, Financial Investors and Regulatory Affairs.

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She has been closely involved in advising several foreign companies in establishing their operations in India, including providing advice on foreign investment laws and strategies for India entry. She has also been involved in various mergers and acquisitions, as well as takeovers of public company involving foreign parties and was closely associated in advising such clients on the foreign exchange regulations.

Having graduated from the Government Law College, Mumbai, she joined the firm in 2007. She is also a Company Secretary.

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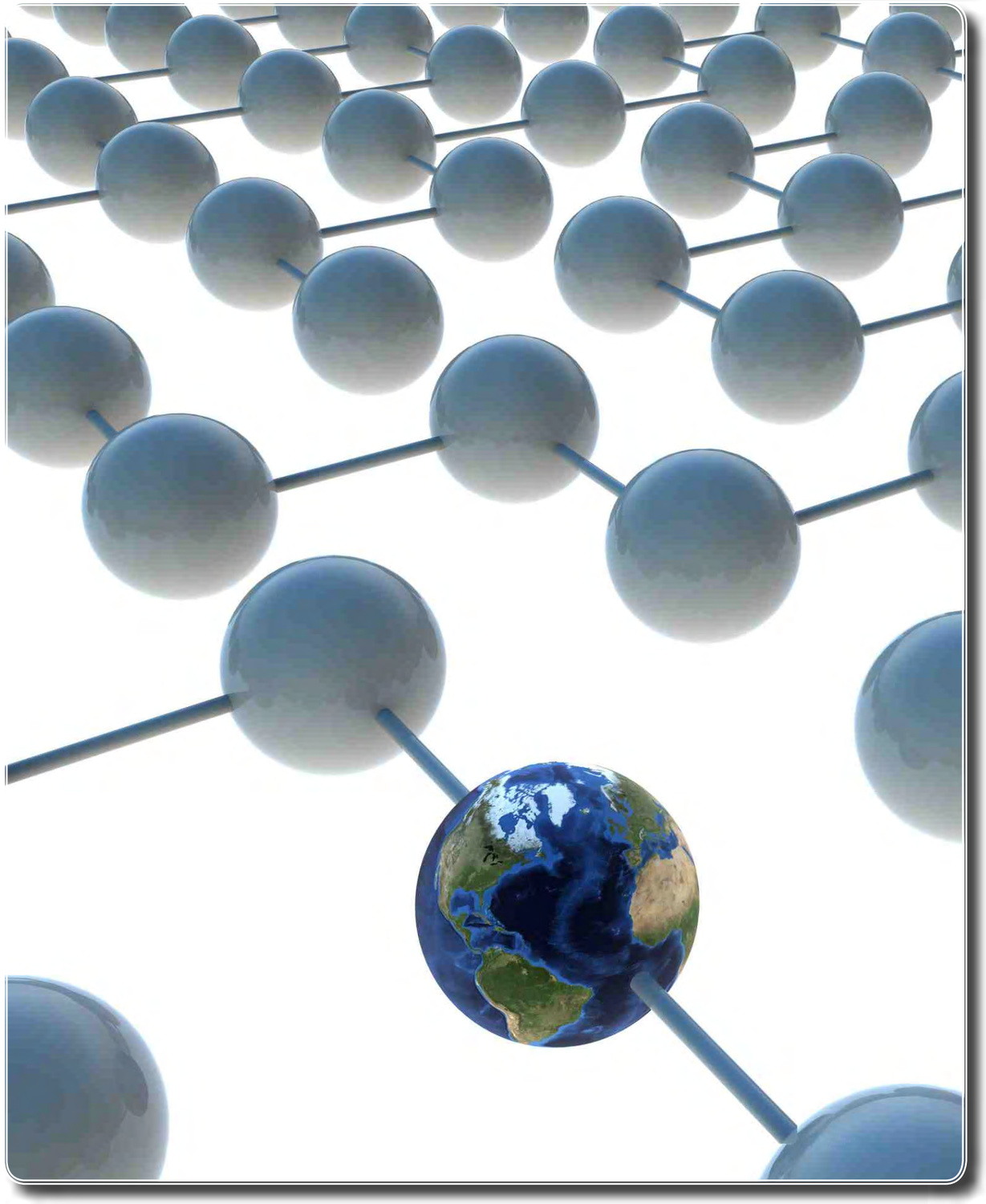

Mergers & Acquisitions in India

Q&A with Bahram N. Vakil

AZB & PARTNERS
ADVOCATES & SOLICITORS

One of the founding partners of AZB & Partners, Bahram N. Vakil is amongst India's foremost infrastructure and project finance attorneys. Bahram is one of the few infrastructure lawyers in the country who has been involved in five of the eight fast track power projects and has been acknowledged as a leading project finance lawyer by most international publications for over a decade. The World's Leading Lawyers for Business mentions that Bahram Vakil is a gregarious and hard headed lawyer according to clients who value his "smart, reliable and practical advice". His finesse in negotiations is especially singled out. "He adds value in negotiations, ensuring both parties see the other's point of view" states Chambers Global. He has a LLM from the Columbia University, and is a member of the New York State Bar. Bahram spoke to Corporate LiveWire to discuss the current state of Mergers & Acquisitions in India:

1) Have there been any recent regulatory changes in your jurisdiction?

There have been a few regulatory changes that have a significant bearing on the mergers and acquisitions scenario in India. Some of the most noteworthy changes are listed below:

Liberalisation of norms governing foreign direct investment in the retail sector: The Reserve Bank of India ('RBI') by way of its circular dated September 21, 2012 ("FDI Circular"), has permitted foreign investors to make foreign direct investment ("FDI") of up to 100% in single-brand product retail trading with the approval of the Foreign Investment and Promotion Board ("FIPB") whether such foreign investor is the owner of the brand or otherwise. Previously, FDI up to 100% was permitted in single–brand product retail trading only in cases where the foreign investor was the owner of the brand. The FDI Circular has also now introduced FDI in multi-brand retail trading by permitting FDI up to 51% thereunder with the approval of FIPB. FDI in single-brand retail trading as well as multi-brand retail trading has been liberalised subject to compliance with certain terms and conditions laid down by the Department of Industrial Policy and Promotion of the Ministry of Commerce and Industry of the Government of India.

Amendments to the Competition Act, 2002: On 4 April 2013, the Competition Commission of India ("CCI"), introduced certain changes in the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('Combination Regulations'). Some of the key changes are as below –

1. Exemption given to transactions involving a 'creeping acquisition'

A new item i.e. item 1A has been introduced which exempts the "gross acquisition" of shares or voting rights in an enterprise up to 5% in a financial year from notification to CCI. The exemption applies only when the acquirer (or its group) already owns between 25% and 49.9% of the shares or voting rights of the target entity. This exemption aligns the Combination Regulations with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

2. Scope of exemption given to intra-group acquisitions reduced

Previously, an acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, was exempted from notification to the CCI. The scope of this exemption has been significantly reduced by introducing two changes. Firstly, the amendment has deleted the word 'control' – leading to possible implications for intra-group acquisitions that are not acquisitions of shares or voting rights or assets. Secondly, the amendment nullifies the exemption where the target entity in which the assets or shares or voting rights are being acquired is jointly controlled by enterprises that are not part of the same group.

3. Scope of exemption towards intra-group mergers widened

The scope of the exemption granted to intra-group mergers and amalgamations has been widened. Previously, mergers and amalgamations between enterprises belonging to the same group were exempt from notification to the CCI only if the enterprises were wholly owned by enterprises within the same group or were a parent and a wholly owned subsidiary. The new provision only requires that more than 50% of the shares or voting rights in the enterprises which are parties to the merger or amalgamation be held by enterprises within the same group. However, this exemption is only available if the transaction doesn't lead to transfer from joint control to sole control.

Companies Bill: The Companies Bill ("Bill") which seeks to amend and consolidate the law relating to companies was passed by the Lok Sabha i.e. the lower house of the Parliament of India on December 18, 2012. The Bill introduces several new provisions such as detailed sections on corporate social responsibility, provisions on the procedure of appointment of directors, auditors etc. The Bill will require the approval of the Rajya Sabha i.e. the upper house of the Parliament of India before it gains the force of law in India. When approved by the Raja Sabha, the Bill will replace the Companies Act, 1956.

2) In recent years, companies such as Tata have invested heavily in steel, power & energy, and automotive industries in the foreign based market. What industries are currently providing the best opportunities for investment?

Commodities and FMCG

3) Are there any jurisdictions which are worthy of highlighting? Do they offer any incentives or particular attractions for foreign investment?

Africa is favourite destination as it offers real attraction for its natural resources and its one billion person consumer market.

4) In the past decade we have seen a sharp rise in outbound M&A activity amongst Indian organisations. Is there still a market for inbound activity?

Yes, there are still active opportunities for inbound activity.

5) What is the best market entry strategy for first time investors in India?

Thoroughly do Due Diligence your Partner / Investee and to consider wherever appropriate / legally permissible having wholly own subsidiaries.

6) Are there any tax issues which investors need to consider before participating in M&A activity in India?

We have favourable Tax Treaty with Mauritius, Singapore UAE amongst others and several other Tax issues which need to be diligently researched.

7) When you are representing in a takeover, what ranks highest on your due diligence checksheet?

Real Estate issues, regulatory consents & permits and financial covenants.

8) What key trends do you expect to see over the coming year? In an ideal world what would you like to see implemented or changed?

I see a moderate pick up in inbound and outbound M&A activity. Ideal changes would be a drastic simplification in our Foreign Direct Investment and tax rules.

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Challenges in acquisition of Indian listed companies (incorporating new aspects of the takeover code)

By Kosturi Ghosh, R. Sampath Kumar & Lavanya Chandan

In recent times, the legal framework governing various aspect of Indian corporate and commercial laws have been overhauled following global best practices and the regulatory regime governing M&A in listed companies is no exception. The growth in level of M&A activity in India is evident from the fact that National Stock Exchange was the world's largest stock exchange in terms of number of trades in equity shares in 2012 (USD 1.4 billion) followed by New York Stock Exchange (USD 1.37 billion) and NASDAQ (USD 1.26 billion). Like other growing economies, Indian laws prescribe a systematic framework for acquisition of interest in listed companies with the view to safeguard shareholders' interests. The regulatory regime regarding acquisition of shares of listed companies is mainly governed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "Takeover Code"). The Takeover Code requires an investor acquiring 25% or more voting rights in a target company to make an open offer to further acquire at least 26% of the total shares of the target company from the existing public shareholders. Further, an investor holding 25% of more voting rights can acquire only upto 5% of the total shares or voting rights in any financial year up to a maximum of 75% (non-public shareholding limit) without having to make an open offer.

While the Takeover Code retains basic principles of the earlier regulations issued by the Securities and Exchange Board of India ("SEBI"), its introduction offers a relatively detailed and definite regulatory regime ensuring that takeovers operate in a fair and equitable manner. Despite these regulatory changes, acquisition of substantial stake or takeover of public listed companies involves various challenges, both practical and regulatory. Some of these challenges have been dealt with in greater detail below.

Due Diligence

The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 ("Insider Trading Regulations") prohibit a person from dealing in securities of a company while in possession of any unpublished price sensitive information regarding the company. As a result, any diligence exercise is limited to documents which are not price sensitive or which only detail the information already publicly known. However, this approach significantly limits the effectiveness of the due diligence exercise.

Offer Announcement

The Takeover Code requires an investor to make a public announcement communicating its intention to acquire shares from the existing shareholders by way of an open offer as soon as the investor enters into an 'agreement to acquire' shares in excess of the limits which mandate an open offer. An oral agreement, memorandum of understanding or a term sheet may also be construed as 'agreement to acquire' thus requiring the investor to make a public announcement. Therefore it is important for the parties to be mindful of events which might trigger an obligation to make a public announcement while structuring their negotiations and draw their timetables accordingly.

Controlling Premium

The Takeover Code prohibits payment of a differential price to certain shareholders in acquisition of shares of a listed company. Therefore, unlike in the past, investors would not be able to pay a premium on the consideration for acquisition of shares from the promoters or characterise these payments as non-compete fee, consultancy fee, etc. While there may be an argument in favour of paying differential price to a promoter who drives the business of a company as compared to an ordinary shareholder, the SEBI has found this method to have been abused in the past with promoters receiving consideration disproportionately in excess of other shareholders. In this context, it is possible for the SEBI to scrutinise contemporaneous transactions between investors and the promoters which do not take place at an arms' length basis to ensure that payment of control premium is not effected in the guise of an independent transaction. Further, a blanket ban on payment of controlling premium tends to disincentivise the promoters from effecting acquisition transactions since it is unlikely that a prospective investor would agree to pay a premium to all shareholders in an open offer.

Delisting Hurdle

If an investor exceeds the 75% non-public shareholding threshold upon the completion of an open offer, the investor is precluded from launching a delisting process. Accordingly, the investor is required to first reduce shareholding to 75% within a period of one year and is also barred from initiating the delisting process within this period. This change to the Takeover Code creates unnecessary regulatory hurdles for the investors looking to undertake a complete acquisition of a listed company and ultimately delist the company. Even in cases where the delisting process is undertaken, a common bottleneck faced is to deal with the residual shareholders who do not tender their shares under the delisting process, these shareholders can only be acquired or reduced by following a rather cumbersome process. This restriction in the Takeover Code is a statutory recognition of SEBI's decision (under the previous takeover regulations) to disallow iGate's proposal to delist Patni Computers until it complied with the minimum non-public shareholding threshold of 75%. Consequently, in bringing the shareholding down to 75%, iGate encountered problems with the high sell down price arrived at by way of a reverse book building process.

Inconsistent Regulatory Overlap

Acquisition of shares may at times also trigger other regulations resulting in undue adversity from the perspective of an investor. For instance, a transaction where an investor seeks to acquire a stake in a listed company (which triggers an open offer) and such acquisition gets characterised as a combination under the Competition Act, 2002, apart from making the open offer under the Takeover Code, a notification needs to be made to the Competition Commission of India (CCI). Having made the notification to CCI, the investor will be prohibited under the Competition Act to carry out the acquisition until a favourable order is passed by CCI or upon expiry of 210 days from the date of the notification, whichever is earlier. Such a delay in completing the acquisition is particularly onerous on the investor who is required to pay an interest for the period of delay to the shareholders who have tendered their share in the open offer. This situation may also arise if the transaction requires approvals from the Foreign Investment Promotion Board, Reserve Bank of India, etc., thus affecting the investor's timetables and casting an undue financial burden. A similar issue was recently encountered by Diageo in its acquisition of majority stake in United Breweries. While SEBI allowed commencement of the tendering process 12 days after Diageo obtains all relevant statutory approvals, it directed Diageo to pay an interest of 10% per annum to the shareholders who have tendered their shares in the open offer.

Conclusion

The recent regulatory changes certainly are a positive step towards regulating a changing takeover environment and go a long way in providing a level playing field to the shareholders. Yet certain provisions of the Takeover Code and other related regulations need to be amended keeping in mind the market realities to provide an impetus to the M&A activity in listed companies.

Disclaimer:

The contents of this article are intended for informational purposes only and do not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein.

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He has also advised companies in their general corporate compliance and has been involved in preparing legal opinions on various matters relating to corporate, foreign exchange and information technology laws. Some of the clients Lavanya has worked with include Telenor, Chrysler, OLX, Publicis Groupe, Canaan Partners.

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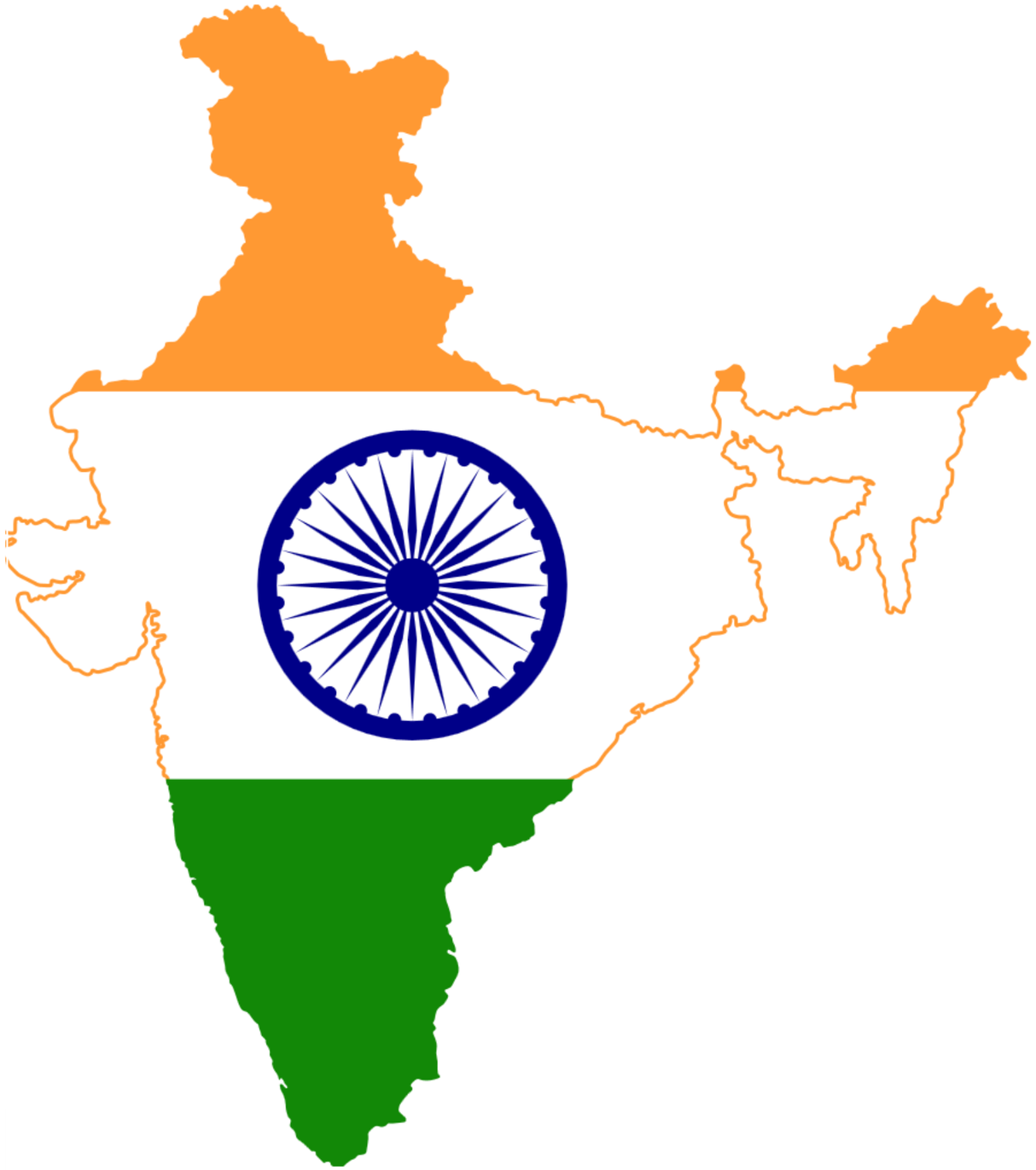


Challenges For M&A In The Indian Telecom Sector

By Siddharth Manchanda & Ayesha Bharucha

India is undoubtedly one of the fastest growing telecom markets in the world. Since the nineties when the sector was opened up for private sector participation, it has contributed significantly to the country's economic growth.

Today, the telecom industry is at a crossroad. Increase in the number of players, price wars, paucity of spectrum, cancellation of licences, idle infrastructure, etc. have severely affected the bottom line of most players making consolidation attractive and, in some cases, even imperative. Recent newspaper reports indicate that even a major established player such as Tata Teleservices is considering merging with Telenor.

That the Government, too, recognises the need for consolidation is evident from its National Telecom Policy, 2012 where one of its stated objectives is "to put in place a liberalised merger and acquisition policy with necessary thresholds while ensuring adequate competition".

Licence Conditions

The terms of each licence agreement entered into between the Department of Telecommunications **(DoT)** and the licensee, amongst others:

• restrict any single company / legal person, either directly or through its associates from holding an equity capital of 10% or more in more than one licensee operating in the same service area (for licence purposes, India is divided into several service areas and separate licences are granted for each service area); and

• prohibit the licensee from transferring its licence without the approval of DoT; and

• permit intra service area mergers and acquisitions as well as transfer of licences subject to there being not less than three other operators in the relevant service area to ensure healthy competition as per the guidelines issued in this behalf from time to time.

The above terms and conditions are under review as part of an extensive overhaul of the existing licence regime. As spectrum has recently been unbundled from the licence, the Telecom Regulatory Authority of India ("TRAI") has recommended that the cross holding requirement should only be linked to spectrum holding.

DoT Guidelines for Intra Service Area Merger of Licences

In addition to the above condition that the total number of operators in the relevant market (both wireline and wireless) should not fall below four, the current guidelines of 2008 stipulate that:

• the market share of the merged entity in the relevant market shall not exceed 40% either in terms of subscriber base separately for wireless as well as wireline subscriber bases or in terms of adjusted gross revenue on the basis of which the licence fee is paid; and

• permission for merger would be accorded only after completion of three years from the effective date of the licence.

The proposed liberalised M&A policy (as unveiled in a press statement issued by the Telecom Minister and in the draft guidelines on the new licensing regime) seeks to authorise TRAI as opposed to DoT to give consent for merger of licences and indicates that merger up to 35% market power of the resultant entity would be allowed through a simple, quick procedure. In certain cases, TRAI may also be willing to consider mergers where the resultant entity has market power in excess of 35% but not exceeding 60%. For determination of market power, market share of the subscriber base and the adjusted gross revenue of the licensee in the relevant market would be considered. Finally, in case the total spectrum held by the resultant entity is beyond the limits prescribed, the excess spectrum must be surrendered within one year of the permission being granted for the merger.

Whilst the stated objective of the Government is to provide a more liberalised policy, recent press reports suggest that the Government may actually disallow a single company / legal entity from holding any shares in more than one licensee company (as opposed to up to 10% which is currently permitted). Also, there are reports that DoT may not approve any mergers unless the operators pay a one-time spectrum fee for the remaining period of their license (which is currently being challenged by the operators in court).

Merger Control Regulations

Mandatory pre-merger clearance of the Competition Commission of India ("CCI") is required for all mergers and acquisitions exceeding specified thresholds (it is expected that given the volume of investment required in this sector, most proposals would exceed such thresholds). A transaction which falls within any of the specified thresholds must be notified to the CCI within 30 days of signing the transaction document or receiving board approval for the merger, whichever is earlier. No combination can take effect until the CCI has granted approval.

Mandatory Public Offer

Where the target company is listed and the acquirer proposes to purchase not less than 25% of its shares, it must make an offer to purchase another 26% from the public for the consideration calculated in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011. The entire process will take about 3-4 months. Mergers pursuant to an order of a court under applicable law (see below) are exempt from the open offer requirements where, on completion of the merger, at least 33% of the shares of the combined entity are held by the persons who previously owned and controlled the acquired entity.

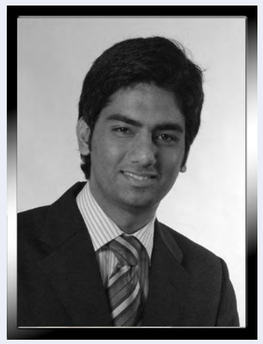
Court Approval for Merger

Under the Companies Act, 1956, merger of two or more companies will require the approval of their shareholders and creditors (majority in number and three fourths in value) and the sanction of the court. Generally, this can take anywhere between 3-12 months. Additionally, SEBI (the securities market regulator) has recently mandated that where one of the companies involved in the merger is a listed company, SEBI's prior approval must also be obtained. As a result, consolidation through a court approved scheme of merger where one of the entities is listed has become even more protracted and cumbersome.

There is a lack of coordination between DoT and TRAI which is evident from the fact that the draft guidelines for mergers and acquisitions which were to be approved earlier this year are still at the discussion stage. The regulatory disconnect together with the proposed one-time spectrum fee has resulted in operators deferring their plans to consolidate until clarity emerges.

There is also the issue of overlap between DoT, TRAI and CCI which is likely to continue. Just recently, the Finance Minister, while acknowledging that telecom is a market where there are obvious gains from integration and that regulators have to take a call on the right balance between too many players and too few, has asserted that the overarching role of CCI in competition policy cannot be ignored.

Whilst consolidation amongst the Indian telecom operators is essential for their survival, it is fraught with many uncertainties and regulatory hurdles.



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CorporateLiveWire

M&A in the Indian Energy Sector: Recent Trends & Challenges

DHIR & DHIR ASSOCIATES

By Jatinder Cheema

The upstream segment of the Oil & Gas Sector in India is dominated by the state-owned Public Sector Undertakings ("PSU"). The Oil & Natural Gas Corporation (ONGC), a PSU, is the lead player and accounts for nearly 75% of the total national output. ONGC through its subsidiary ONGC Videsh Limited (OVL) makes acquisitions in upstream oil & gas assets overseas. The inward investment in this sector has been primarily driven by The New Exploration Licensing Policy ("NELP") promulgated by the Government of India which has facilitated the acquisition of oil and gas blocks and successfully attracted foreign investment[1] and facilitated entry of large number of private players in the E&P segment. PSU's have not been engaged in any major M&A activity overseas, the behemoth state-run enterprises have been increasingly focusing on and in some cases aggressively scouting for acquiring oil assets around the World.

IX NELP rounds have been conducted so far, in order to attract further foreign investment in this sector. Government is considering the Open Acreage Licensing Policy (OALP) under which year-round bidding would be possible. However one of the hurdles is to agglomerate and prepare a data depository for E&P Companies in order for them to review the reliable data throughout the year. Director General Hydrocarbons is in the process of developing the National Data Repository which shall facilitate agglomeration of all of the relevant data under one roof just like the data for minerals acreage for prospecting is available from the Geological Survey of India.

The increasing demand of the fossil fuel in the energy hungry world, especially the developing nations like China, India, and Korea has fueled the flow of private equity in this high risk sector. The Indian O&G market has witnessed some prominent deals including the USD 8.6 billion acquisition of Cairn India by the Vedanta group, the USD 9 billion acquisition of Reliance Energy by British Petroleum and the acquisition of the UK based BG Group owned Gujarat Gas Co. Ltd. by Gujarat State Petroleum Corporation for USD 442 million (approximately).

Major Issues & Challenges

The major challenges faced by the M&A activities in the energy sector arises from the restrictive nature of political and regulatory system in India, and the lack of large capital required to invest in this capital intensive sector. Since M&A activity in this sector entails extensive capital investment it results in limited private players to take benefit of Government policy and therefore the requirement of foreign capital becomes imperative. The Government of India in order give fillip to this sector has eased the norms for foreign investment under the automatic route for 100% investment in the exploration activities in the Oil & gas fields, Petroleum product marketing, Petroleum product pipelines, natural gas pipelines, LNG regasification infrastructure, and such other activities other than refining but including market study and formulation. However, foreign investment is permissible up to 49% in the petroleum refining by the Public Sector Undertakings without any divestment or dilution of domestic equity in the existing PSU under the non-automatic/FIPB route.

The requirement of government consent for any change in the status of the company to which the oil or gas blocks have been allotted has proven to be a major issue in this field. The Production Sharing Contract ("PSC") which is entered into by the Government and the acquirer of the oil or gas blocks provides that a company which has been allotted the oil blocks may enter into a transaction which may result in a change in the management or control of the company only with the prior written consent of the Government.[2] It further provides that the government consent should factor various considerations such as the technical and financial strength of the new company, details of the shareholders agreement and the composition of Board of Directors consequent upon such transaction.[3] The Vedanta-Cairn India deal which sought government approval in August, 2010 got clearance only in July, 2011. Moreover, being a government order it was challenged in the courts and got the Supreme Court's approval only recently in May, 2013. The Vedanta case evidences that these requirements tend to delay the M&A transactions and have the potential to discourage new investment in this area. The requirement of government approvals permeates even beyond the acquisition process and very often the exploration slackens for want of environmental, defense and other clearances. The majority of the exploration process being carried under the previous NELP rounds will be dependent on the efficiency of the administration and the timely grant of government approvals.

Most acquisitions in this sector are large transactions and shall require the approval of the Competition Commission of India. However, the general trend suggests that clearances from the Competition Commission are readily obtained. This may be due to a number of factors. The competitive impact of combinations is often measured on the basis of the market shares of the companies. However, in a number of NELP acquisitions, the ventures are still in their exploratory phases and the actual market share is therefore undetermined. Moreover, since the price caps for the output is already fixed in the PSC, there is little fear of adversely affecting the consumers. In January 2013, the Competition Commission, after assessing the natural gas sector, the market share of the parties, and the impact of the combination, granted its approval to the GSPC-GGCL deal.

Since the M&A activity in this sector has been rather subdued so far, once the M&A activities in the Oil and Gas sector intensifies with inward investment into India, from an acquirers perspective, upon a substantial acquisition amounting to change of control of an Indian Oil Company shall trigger an open offer requirement. If such transactions entail combination of both the acquisition and the issuance of fresh capital by the Indian Company it shall require besides the SAST Regulations further compliances and adherence to the ICDR regulations.

As is expected that since much of the M&A activity shall be dependent on infusion of foreign capital, the investors and company resident in India shall have to adhere to the extant FEMA Guidelines.

Much will depend on the structure of the transaction being crafted i.e. asset purchase, share purchase, mergers within India or cross border mergers wherein a foreign oil & gas entity merges with an entity incorporated in India under Section 394 of the Indian Companies Act and the tax planning under each of these structures. It is pertinent to mention that the Indian Companies Act precludes the merger of an Indian Company with an entity overseas. In order to boost the outward investment, the FEMA Regulations facilitates investments in Oil & Gas entities overseas.

Conclusion

It is exciting times in the Oil and Gas sector in India and 68 blocks are expected to be offered in the NELP X round with prior approvals on each of the blocks from the Ministry of Environment, Ministry of Defense, and other relevant departments of the Government.

If this is accomplished, a major hurdle in speedy development which has plagued this sector would have been addressed. Since Government is keen to engage with the market players from overseas such a move shall boost investor confidence. Consolidation of geo-scientific information at one nodal National Data Repository will further ease and facilitate the investment climate within India.

The implementation of C.Rangarajan Committee's report and reviewing the system of production sharing should be the top priority. However, a focused due diligence, intensive geo-scientific research and a well deliberated PSC would be significant step to bolster investment and M&A activity in this sector.

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1 - http://petroleum.nic.in/nelp9.htm
2 - Article 34, http://petroleum.nic.in/nelp93.pdf
3 - Article 34, http://petroleum.nic.in/nelp93.pdf

Review of "Pipe" Transactions in Taiwan

By Victor I-Hsiu Chang

The recent rise in Taiwan stock markets have created renewed interest from foreign companies, including investment funds, in seeking a significant stake in Taiwan listed companies. One way to acquire a significant stake in a Taiwan listed company without implicating mandatory offer restrictions is via a statutory private placement (PIPE) transaction.

This article summarises the main benefits and shortcomings of PIPEs in Taiwan, which includes restrictions promulgated by the Financial Supervisory Commission of the Ministry of Economic Affairs, ROC ("FSC") in 2010.

For the most part, while PIPEs represent a very attractive method for a strategic investor to invest into a Taiwan company or for a financial institution to take advantage of turnarounds or special situation opportunities, it is not a viable method for financial institutions to acquire stakes in profitable listed companies in Taiwan.

I. Principal Advantages of Private Placements under Taiwan Securities Law

Compared with public offerings, private placements have the following advantages under Taiwan securities law.

First, in a statutory private placement transaction, the issuer is specifically exempted from complying with the mandatory pre-emptive rights of the public company's employees and existing shareholders in regard to new issuances of shares under the Taiwan Company Law. Further, in private placements of newly issued shares, the public company does not need to set aside certain percentage of the shares for public offerings as otherwise would be required under Article 28-1 of the SEL.

Second, although shareholders approval is required, the shares may be priced at below the trading price of the issuer (see further below).

Finally, generally neither approval from nor a prior filing with the Financial Supervisory Commission (the "FSC") is required for private placements, thus shortening the timeframe for fund raising. In addition, documentation work in private placements is less cumbersome than that in public offerings.

II. Qualified Investors

Under Paragraph 1 of Article 43-6 of the SEL, qualified investors include three types of persons: (1) banks, bills finance enterprises, trust enterprises, insurance enterprises, securities enterprises and other juristic persons or institutions approved by the FSC (hereinafter "Type 1 Investors"), (2) natural persons, juristic persons and funds meeting the conditions prescribed by the FSC (hereinafter "Type 2 Investors"), and (3) directors, supervisors and managers of the public company or its affiliated enterprises (hereinafter "Type 3 Investors").

A major 2010 amendment altered the rules for PIPEs issued by companies operating at a profit. As the FSC believes that companies operating at a profit should generally make public offerings as its method for raising more funds, it has adopted amendments to curb usage of PIPEs. Public companies operating at a profit are prohibited from issuing PIPEs unless the public company only has one shareholder, or unless the investor is a "strategic investor", or unless the public company is in financial difficulties and its plan to raise money through PIPEs is approved by the competent authority. Strategic investor is defined to mean an investor that will increase the profitability of the issuer because of its experience, technologies, know-how, product brand or distribution channels, etc., which will allow for horizontal, vertical or collaborative efficiencies that will be beneficial to the issuing company. Public companies operating at a profit are also prohibited from issuing PIPEs to related parties. We expect most private equity funds and hedge funds will not be considered to be strategic investors, absent special circumstances.

III. Shareholders' Approval

Under Paragraph 1 of Article 43-6 of the SEL, the public company needs approval from its shareholders for private placements (i.e., a resolution adopted by at least two-thirds of the votes of the shareholders present at a meeting of shareholders who represent a majority of the total number of issued shares); except that private placements of ordinary corporate bonds only require approval from the board of directors. The notice of the shareholders' meeting should enumerate and explain the following particulars: (1) the basis and rationale for the setting of the price; (2) the approaches to selecting investors (if the investors have been selected, then the relationship between the investors and the public company should be described as well); and (3) the reasons necessitating the private placement.

IV. Prices

The public company should set a reference price of the securities based on the company's market price or net value and other factors (e.g., shareholders' interest), and may be below the company's market price. The FSC requests that the notice of shareholders' meeting specify certain information regarding the price of the securities (e.g., a reference price, a provisional price, and the actual price should not be lower than certain percentage of the reference price). In addition, if the difference between the reference price and the actual price reaches 20% or more, then the public company should seek an opinion from an independent expert and should disclose the rationale for the difference and the expert's opinion. Importantly, we note that one of the major 2010 amendments altered the calculation of the average market price from which the maximum discount of 20% may be taken as the price for the PIPEs. Where the average market price was previously either the price for the securities of the common stock at closing during the prior business day or the average of the price at closing for the prior three business days or five business days, the average market price now required a comparison between the price determined using the pre-amendment method and the average price at closing over the prior 30 business days. The higher price is to be used when determining the maximum discount.

V. Holding Periods

Generally, under Article 43-8 of the SEL, a three-year holding period must elapse before any re-sale of the privately placed securities. Nevertheless, if a one-year holding period has elapsed, then a certain amount of the privately placed securities may be transferred to certain types of institutional investors in accordance with more detailed rules; such amount depends on the average trading volume of the issuer and also varies depending on whether the issued shares are ordinary shares or preferred shares. If a holding period of three years has elapsed, then re-sales of the privately placed securities will not be subject to any restrictions. Nevertheless, one overlooked practical issue is that before the shares become tradable, the issuer needs to file an application with the FSC and therefore if the issuer is in dispute with the applicable holder of the PIPE shares, this could cause complications in their dispute.

In addition to the foregoing, re-sales of privately placed securities under any of the following circumstances are exempt from the aforementioned holding periods: (1) where the privately placed securities are held by Type 1 Investors and no securities of the same type (i.e., the same rights and obligations) are traded on the centralised securities exchange or OTC markets, and the securities are transferred to other Type 1 Investors;

(2) where a transfer occurs by operation of law; (3) where it is a direct private transfer not more than one trading unit (i.e., 1,000 shares), and the interval between any two such transfers is not less than three months; or (4) where otherwise approved by the FSC (e.g., shareholders' acquisition of privately placed securities as a result of liquidation of the issuer or a share swap transaction under Article 29 of the Mergers and Acquisitions Law by which the holders of privately placed securities are allowable to transfer such securities to the counterparty company in exchange for newly issued securities by such company).

Concluding Remarks

While the purchases of PIPEs under the post-2010 rules would directly affect some forms of private equity investments in Taiwan, we also note that other forms of private equity investments in Taiwan to date are not affected and we may also see a rise in other forms of transactions which are potential substitutes for PIPEs, such as SPOs and ECBs (however, SPOs and ECBs do not have the pricing advantages vis-a-vis PIPEs).

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CorporateLiveWire

M&A in Taiwan

萬國法律事務所

By Jackson Shuai-Sheng Huang

The merger and acquisition market in Taiwan has been in a growing trend during the recent years. The growing trend should continue for the years to come because of the untapped potentials in the Taiwan market. Majority of the deals in Taiwan are cross-border deals or deals with cross-border elements. Furthermore, because of the special relationship between Taiwan and China, there are unique issues and challenges related to these deals.

Future Trend

The merger and acquisition market in Taiwan will continue to grow for the years to come because of the following two primary reasons. First, there are a large number of very strong and healthy mid and small size businesses and a good number of the business owners are looking to sell their businesses for various reasons. For example, generally speaking, a lot of these businesses in Taiwan are family owned businesses, the current owners are close to retirement age, and next generation is either disinterested in or unable to manage the family business; this leaves the current owners with only the option to sell the business.

Second, attitude of the policy makers in Taiwan towards private equity should be changing. Traditionally, the policy makers in Taiwan are hostile against private equity. Even though the policy today remains the same, the lobbying force supporting private equity is becoming stronger. Furthermore, Taiwan is going through a recession right now and the government is exploring various options to boost its economy; therefore, it is foreseeable that the policy makers may change its attitude to favour private equity, which would create a stronger capital market and boost the economy of Taiwan. In addition, opening up the private equity market is essential for Taiwan to be connected and on par with the rest of the world.

With more owners looking to sell their businesses and possible change in the attitude of the policy makers towards private equity in Taiwan, the growing trend in the merger and acquisition market in Taiwan is likely to continue.

Issues for a Chinese Entity to Invest in Taiwan

Majority of the merger and acquisition deals in Taiwan are cross-border deals or have cross-border elements. This is because either the purchaser is a foreign entity or the target company has foreign subsidiaries or affiliates. Furthermore, because of the special relationship between Taiwan and China, there are additional issues to consider in a merger and acquisition deal involving a Chinese element.

There are a lot of Chinese entities looking to acquire or invest in Taiwanese company; however, there are limitation on how much of a Taiwanese company can be funded by Chinese entities. By law, a Taiwanese company may only have a certain percentage of its ownership funded by Chinese entities; furthermore, the percentage of ownership allowed varies is dependent on the industry that the Taiwanese company is in. For example, for food processing companies, only up to 50% of the company may be funded by Chinese entities. Because of this requirement, every transaction involving a Chinese purchaser or investor of a Taiwanese company must be reviewed and approved by the investment commission of the Ministry of Economic Affairs.

Unique Issues when Acquiring a Taiwanese Company

A large proportion of the Taiwan businesses, especially those in the manufacturing business, operate in a triangular business structure. Generally speaking, under the triangular business structure, the brand and expertise are in a company in Taiwan, the manufacturing is done by a company in China, and the profits would accumulate in a company that is registered in a tax heaven such as the British Virgin Islands. As the result, there are a few unique issues to consider.

First issue is the valuation of the company. Because of the way Chinese tax law is structured, each company in China keeps two sets of accounting records. One accounting record is for the purpose of the tax filing ("external record") and the other is for the purpose of the company financial audit report ("internal record"). It is likely that the value of the company differs drastically in the two books.

Furthermore, Chinese government has a very strict law and regulations on transferring money offshore. When combined with the triangular business structure sated above, it creates a very unique situation where the inter company account receivables and payables can be easily written off in the internal record while they cannot be dealt with as easily in the external record. To cope with the Chinese laws and regulations, it may take years to clear up the discrepancy in the external record without incurring additional tax liabilities in China. The companies generally just leave this issue alone and unsolved because it does not affect the day to day operation or the profitability of the company. The issue only becomes problematic during a merger and acquisition deal.

Another related issue is the tax issue in China. In addition to the two sets of accounting records and transferring funds outside of Taiwan, frankly speaking, Chinese tax code is extremely complicated and there are very little case law, precedent, or guidance. Therefore, no one really understands the Chinese tax code in full, which includes the business owners, tax practitioners, or the enforcement agencies.

Environmental Issues

The environmental issue is becoming a growing concern in China. On one hand, the laws and regulations written with strict requirements; on the other hand, no one really enforces or follows the laws and regulations. When the purchaser is a domestic buyer or a buyer with extensive operations in China, this is not much of an issue. However, when the purchaser is a foreign purchaser with no other operation in China and the purchaser brings the same mentality as purchasing a company in a country where environmental laws and regulations are strictly complied with and enforced, there will be significant gaps in understanding and expectations with the seller.

On one hand, the purchaser would expect and require the real properties the target company owns must comply with all environment laws and regulations. There are even cases where the purchaser would not only expect compliance with the Chinese law, but also with the international standard. On the other hand, the seller would only be operating in accordance with the Chinese customs and standard, which is barely following the laws and the regulations, and would find the purchaser's above requests unrealistic and impractical.

Conclusion

The merger and acquisition market in Taiwan should continue to grow during the next few years. However, because of the special relationships between China and Taiwan, there are special and unique issues in related merger and acquisition deals. For both the purchaser and the seller, it is recommended to have an experienced local team of experts to assist with the relevant transactions.

Formosa Transnational Attorneys at Law – Representing the Biggest M&A Transactions in Taiwan

Jackson Huang is an expert in cross-border Litigation and International Arbitration, International Trade, Corporate and Financial Regulations, M&A Activity and Anti-trust Laws. He has been awarded by Corporate INTL as M&A Lawyer of the Year in Taiwan 2013. Huang is a member of various professional bodies including New York State Bar Association, Taipei Bar Association, Taiwan Law Society, European Chamber of Commerce Taipei and The Chartered Institute of Arbitrators (CIArb).

In the year of 2012, Jackson Huang led the M&A team of Formosa Transnational Attorneys at Law in various significant deals with the most important transaction including the representation of San'an Optoelectronic Co., China's largest LED epitaxial wafer maker, in a substantial cross-strait M&A deal.

In this deal San'an bought roughly 20 percent stake in Taiwan's Formosa Epitaxy Inc. for NT$2.352 billion (USD 80.82 million) during November 2012. This is the largest M&A deal in the history for Chinese company's direct investment in Taiwan.

In addition to San'an Optoelectronic Co's., acquisition of Formosa Epitaxy Inc.'s shares, Formosa Transnational Attorneys also represent 20 Taiwanese key suppliers in their negotiation of their claims in the Prince Sports Chapter 11 bankruptcy proceeding and its subsidiaries liquidation process in London and Paris.

From the M&A perspective, they also represent some key suppliers in purchasing Prince's valuable assets and negotiating IP licensing deals while the bankruptcy proceeding is ongoing. Formosa Transnational Attorneys successfully achieve the very significant recovery rates (around 40%) and close many win-win M&A deals for both the key suppliers and Prince Sports.

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Summary of the Lecture, "Recent Trends in Insolvency & Real Estate in Japan"

BAKER & MCKENZIE

By Shinchiro Abe

1 Current Japanese Real Estate Market Situation

(1) Economic Stagnation after the Subprime Mortgage Crisis

As was the case in the United States, the subprime mortgage crisis had a serious impact on the Japanese real estate market. For example, The Tokyo Stock Exchange REIT Index, which allocates the number 1000 to the total value of all listed J-REITs as of 31 March 2003, diminished by 48.4% after Lehman Brothers filed for bankruptcy in September 2008. Similar indices fell by 37% and 55% in the US and Australia, respectively. Many real estate companies went bankrupt, and the total debts of these bankruptcy companies reached JPY 1 trillion (USD 1.2 billion). The Japanese economy then entered a long period of stagnation during which real estate prices did not rebound. This nightmare continued for several months.

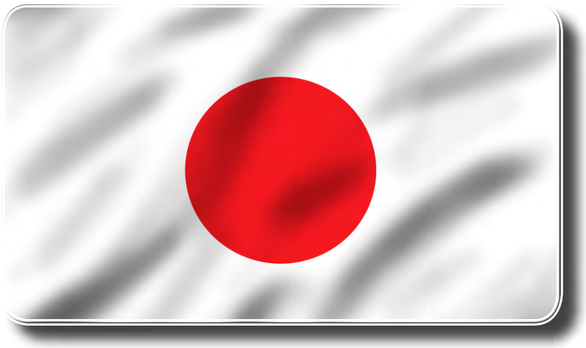
(2) Revitalisation of the Market

However, this dismal situation was completely altered by Shinzo Abe's second term as Prime Minister from the Liberal Democratic Party starting in late 2012. The new government initiated a policy to end deflation by facilitating inflation in the Japanese economy. This policy is now stimulating the Japanese real estate market, and the price of real estate has begun gradually increasing. Many banks are now eager to expand their loans to real estate companies and individuals who wish to purchase property.

2 Popularity of J-REITs

This revitalisation of the real estate market has increased the popularity of Japanese REITs (J-REITs). As of late March 2013, the total amount invested in J-REITs reached around JPY 7 trillion (approximately USD 74.5 billion). This amount greatly exceeds the pre-subprime mortgage crisis maximum. The most important reason for this is the Bank of Japan's decision to expand the amount of its purchases in the equity of listed J-REITs to JPY 130 billion - approximately USD 1.46 million - in 2013.

The total amount invested in J-REITs has soared from JPY 2 trillion in 2008 to JPY 7 trillion in 2013 despite the fact that J-REITs have existed for less than ten years.



3 Summary of J-REIT structure

First, an investment corporation is established. This is a type of vehicle which owns assets for profit-making purposes. The investment corporation then raises funds via bank loans and/or investments by financial institutions, such as banks and Japanese pension funds. Individuals can also invest in the corporation. The corporation invests the funds it raises in various property and beneficiary rights related to real estate. Finally, the corporation receives rental fees and dividends from its assets, repays its loans and pays dividends to its investors.

4 Methods of Dealing with a Recession

(1) Change of Sponsor

When an investment corporation becomes distressed, one or more new sponsors will obtain almost all of the company's equity and manage it. This event triggers a change of control. The aim of this is to strengthen the reliability and trustworthiness of the REIT even in the event of an extreme slow down in business under the management of the old sponsor.

For example, Da Vinci Advisors, a famous J-REIT, raised a total amount of JPY 1.5 Trillion (USD 18 billion) in investment from 2004 to 2006. However, it became severely distressed mainly due to the high purchase cost of its assets in the wake of the Subprime Mortgage Crisis. This economic stagnation forced the company to replace its old sponsor with new sponsors.

(2) M&A

In M&A, a distressed corporation will merge with a healthy investment corporation in order to restore the J-REIT's reliability and trustworthiness.

(3) Bankruptcy and Liquidation

In contrast to the above methods, a distressed company will cease to exist as a result of a bankruptcy and liquidation. A court-appointed liquidator will sell all of the company's assets and distribute the proceeds to its creditors and equity holders. One of the attendant problems with bankruptcy and liquidation in the midst of a severe economic downturn is an often remarkable decline in the value of assets due to massive oversupply in the real estate market.

Please note that these legal bankruptcy procedures have not been very popular to date. This is partly because most J-REIT lenders have not forced corporations in which they have invested into bankruptcy by declaring default even where such corporations have become unable to repay their loans. Lenders preferred not to sell companies' assets in the depressed market, and took no action.

(4) Out-of-Court Workouts for Real Estate Investments

Turnaround ADR would be useful, especially for listed companies. This method is a type of out-of-court workout which is referred to in the Insol 8 principles and in the London Approach. Influential creditors, such as megabanks, are involved in the procedure, under which a debtor will prepare a restructuring plan which consists mainly of rescheduling loans and forgiving debt. This plan will then be approved by all related parties.

Please note that this workout procedure is a private insolvency procedure. This means that listed corporations employing it would not be forced to be delisted. Hence, as note above, this workout procedure would be especially beneficial to listed companies and their shareholders.

Shinichiro Abe is one of Japan's leading advisers in local and international corporate restructuring and insolvency law as well as competition law. He has spoken at various conferences related to his field and has authored and co-authored several publications, including the M&A Handbook on Conducting Business Practically. In addition to his legal practice, Mr. Abe is a professor at Chuo Law School.

Mr. Abe's practice focuses on transactions involving corporate law, commercial law, antitrust law and litigation, as well as dispute resolution including alternative dispute resolution procedures. He has extensive experience advising on Japanese and international structures requiring insolvency protection and solutions.

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Expected Amendment to Procedural Rules on Allotment of Shares

By Tsuyoshi Shimizu & Mayuko Tsujimoto

The legislative council of the Ministry of Justice of Japan compiled an outline of the proposed amendments to the Companies Act of Japan in September 2012, and such proposed amendments include an amendment to the procedural rules on allotment of shares.

Background of Amendment

Under the existing Companies Act, a "public company" (i.e., a stock company whose articles of incorporation do not require company approval for transfer of at least one class of its shares, such as a listed company) may conduct a third-party share allotment based on a board resolution without a shareholders resolution, unless the shares are to be issued at a "particularly favorable" price compared to their fair value. Under such rules, there have been some cases in which listed companies conducted a third-party allotment, based solely on a board resolution, that resulted in a significant dilution of stock ownership or a change of control of the company. A strong argument arose for the existing rules on share allotments to be amended so that neither may the rights of shareholders be significantly diluted nor control of the company be changed arbitrarily by a decision of the directors even if the shares are issued at a fair price. Accordingly, each stock exchange in Japan created new regulations to the effect that, when a listed company conducts a third-party allotment that would result in an increase of voting rights by 25% or more of all the existing voting rights of the company or a change of control of the company, such company must either (a) obtain an opinion of a third party independent from management (i.e., directors) regarding the necessity and suitability of the third-party allotment, or (b) obtain shareholders' approval of the allotment (e.g., by means of a shareholders resolution). However, the argument remains that, apart from such stock exchange regulations, the Companies Act should also provide for appropriate rules on a third-party allotment that are applicable to a public company (including both listed and non-listed companies).

Proposed Amendment

Under the proposed amendment, when a public company intends to allot shares to a subscriber (except the company's existing parent company) that would result, after issuance, in an increase of the voting rights held by the subscriber (together with those held by its subsidiaries) to more than half of all the voting rights of the company, the company must notify each shareholder, or give public notice (or, if applicable, make required securities filings), of, among other things, the name and address of the subscriber and the number of the voting rights the subscriber will hold as a result of the issuance, not later than two weeks prior to the expected effective date of the issuance.

If any shareholder or combination of shareholders holding not less than one-tenth of all the voting rights of the company notifies the company of its dissent from the share allotment within two weeks from the date of notice or public notice, the company must obtain, by a shareholders resolution, approval of the allotment not later than the day immediately preceding the expected effective date of the issuance; except that this requirement will not apply where the financial status of the company is significantly worsening and the share allotment is urgently needed in order to maintain the company.

Further details are as follows.

(i) Threshold
The proposed rules will apply to cases where the voting rights held by the subscriber (together with those held by its subsidiaries) will exceed 50% of all the voting rights of the company after the issuance. Thus, for example, the proposed rules will apply, even if the allotted shares total only 3% of all the voting rights of the company, as long as the voting rights held by the subscriber will increase from 49% to more than 50% as a result of the allotment. On the other hand, the existing parent of the company, when it is the subscriber, is excluded from the scope of the proposed rules because the control of the company does not change when the company allots shares to its existing parent.

(ii) Information Provided to Shareholders
The proposed rules aim to provide all shareholders with information necessary for them to decide whether or not to dissent from the allotment. Such information to be provided to the shareholders, in addition to that required under the existing Companies Act, must include the identity of the subscriber and the number of the voting rights the subscriber will hold as a result of the allotment, and possibly, pending the final amendments, the details of the decision of the board of directors and the opinion of the board of statutory auditors of the company with respect to the allotment.

(iii) Resolution of Shareholders
Under the proposed rules, when the company must obtain approval by a shareholders resolution, such resolution must be made by a majority of the voting rights held by all the shareholders entitled to vote at the meeting where the shareholders holding the majority of the voting rights held by all shareholders of the company entitled to vote (this quorum requirement may be relaxed by the articles of incorporation but may not be relaxed to less than one-third of the voting rights held by all shareholders of the company entitled to vote) are present in person or through a written ballot or represented by proxy.

As to the exception for an urgent situation mentioned above, the company's existence must be at risk in the absence of such allotment. Only an urgent necessity for funding will allow a company to forgo the approval by a shareholders resolution. When a company implements a share allotment without approval by a shareholders resolution on the grounds of an "urgent necessity" for funding, even where a shareholder or combination of shareholders holding not less than one-tenth of all voting rights of the company dissent from such allotment, such shareholders may file for an injunction against such allotment to dispute the "urgent necessity".

Expected Impact on Practice

Under the proposed rules on share allotments, a public company will be required to set a timetable for allotments in case the company is required to obtain approval by a shareholders resolution. In principle, a company would be required to choose two options: (i) set a period long enough to enable the company to hold a shareholders meeting before the expected effective date of the issuance in cases where a shareholder or combination of shareholders holding not less than one-tenth of all voting rights of the company dissent from the allotment; or (ii) not set such a long period but simply refrain from the allotment where it turns out that the approval by a shareholders resolution is required (and initiate the issuing procedures anew with the expectation of obtaining the approval by a shareholders resolution). With respect to option (i), it is possible for the company to obtain the approval by a shareholders resolution voluntarily without waiting for dissent.

The submission to the Diet of the amendment bill is currently pending as there are many other matters that have priority over the Companies Act amendments, and it is not clear when the bill will be submitted. However, it is expected to take place in the near future. More details of the proposed rules will become known when the bill is actually submitted to the Diet, and the impact of the amendment should be further assessed at that time.

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M&A in Indonesia – Procedures & Opportunities

LUBIS ♦ GANIE ♦ SUROWIDJOJO

By Mohamed Idwan Ganie

Indonesia's substantial population, whose prosperity is steadily increasing, and ample natural resources have proven to be an attractive business environment for investment. At a time of turmoil in more developed markets Indonesia presents a potentially more appealing proposition than some of its peers – an economy driven by growing domestic demand rather than exports, with a domestic resource base, and a market that is growing organically rather than due to government policies.

Combined with substantial market opportunities presented by a wide range of sectors that have yet to be developed, including even basics such as agriculture, there is ample room for continued business growth in the years and decades to come.

Legislative M&A Framework

Indonesia's principal legislative framework applicable to M&A activities consists of the Company Law, the Investment Law, the Capital Market Law for public companies, and the Antitrust Law. The Company Law provides well-defined procedures for conducting an M&A deal that have to be followed from before the transaction takes place, and is further implemented by a series of Government Regulations, some of them sector specific, as in the case for banks. The Investment Law is principally of note for M&A deals involving foreign parties, and is further implemented by Presidential and other regulations that set out certain foreign ownership limits and procedures that have to be followed. The Capital Market Law, and a wide range of regulations issued by the capital market regulatory body, set out a range of rules and procedures that apply to M&A of public companies. Finally, the Anti-Trust Law, and its implementing regulations that are issued by the specialised regulatory body (KPPU), apply to M&A deals above certain thresholds, requiring notification and prohibiting certain deals from taking place.

Furthermore, certain sectors, such as banks and other financial service businesses, are typically regulated in relation to M&A by specific laws and their respective regulatory bodies, with certain industry-specific procedures and requirements that have to be followed in the course of any deal. It should also be noted that Indonesia's uniquely labour-friendly legislative regime should be considered in relation to any existing employment and labour union relationships before executing an M&A transaction.

Of particular note at this time is a recent legislative change that attempted to subject public companies to foreign ownership restrictions that have previously only been applied to non-public companies. This is a very recent change from early 2013, and as such there remains a level of uncertainty that should be carefully evaluated, and consulted with the authorities, prior to structuring any M&A transaction that may be subject to its applicability.

M&A Challenges & Opportunities

As in any business venture in Indonesia, it is important to be mindful, and adequately plan for, at times opaque legislation and an excessive bureaucracy that operates much slower than regulated and often acts in an arbitrary manner. The transactions should also be structured with a view of ensuring enforcement, and having a workable plan for dispute resolution. Particularly in view of certain aspects of corruption that affect private sector relationships, due to the increased uncertainty caused by being unable to rely on the judiciary to be competent and impartial in the settlement of disputes.

In light of such challenges, one of our firm's unique selling points is the combination of our long-standing commercial law practice and our premier litigation department that has extensive experience in dealing with commercial disputes in the context of arbitration and alternative dispute resolution as well as litigation in the Indonesian courts. This allows our corporate transaction departments to benefit from such litigation experience, and from their own compliance work, to ensure that any transactions handled by our firm are carried out with a view to the potential for future disputes and any existing risks.

Due diligence is critical in any Indonesian commercial transaction, and particularly so in M&A deals. It is important to thoroughly verify the company paperwork, ownership, and particularly licenses, and to become comfortable with the selling parties, any remaining investors, and any existing business partners of the target entity.

In dealing with the Indonesian bureaucracy it is important to note that corrupt practices have adapted and transformed in recent times, with a shift to rent-seeking behavior rather than payment for obtaining an advantage. Which in turn makes business operations more susceptible to disruption unless the bureaucracy is navigated with a view of potential risks and a realistic view of timelines. This requires companies, particularly those who are subject to extra-territorial anti-corruption legislation, to take a much longer-term strategic view rather than merely having a reactive approach.

Nonetheless, there are very lucrative M&A opportunities that span the full range on Indonesian business sectors. Not least due to a professionalisation of Indonesian businesses in general, and particularly due to a trend of previously individual or family-owned businesses undergoing transformations as they and the surrounding market grow and change.

Specifically, the natural resources sector presents certain opportunities, having become a common target of populist legislative policies. And combined with the effects of varying world demand for commodities, companies in the sector often come under pressure as the surrounding conditions undergo at times dramatic change. A number of such recent policy changes, with the foreign ownership restrictions and the domestic processing obligations for minerals, have raised operational and financial issues for a number of companies, but at the same time have also presented certain opportunities in the market.

Similarly, in the financial services sector there have been a number of policy changes, a trend that is expected to continue with new Banking and Insurance laws currently being drafted. A number of such recent policy changes, including ownership restrictions and new financial health regulations, should therefore be carefully monitored, particularly since further policy changes can be expected around the time of the 2014 election. As a result there will be a certain amount of consolidation of the smaller players, as the more stringent financial health requirements begin to come into force. Other sectors that have seen changes due to new and revised legislation include franchises, importers, and a wide range of producers (due to the issuance of a large number of Indonesian National Standards (SNI) that have to be complied with). While challenging for certain businesses, such legislative change also spurs on previously content businesses to become more active and seek new business partners, acquirers, or other business arrangements in order to survive in the highly dynamic, both in terms of legislation and market development, Indonesian business environment.

Mohamed Idwan ('Kiki') Ganie is the Managing Partner of Lubis Ganie Surowidjojo (LGS). He graduated from the Faculty of Law of the University of Indonesia and holds a PhD in Law from the University of Hamburg, Germany. Dr. Ganie has more than 30 years of legal experience, and specialises in commercial transactions and commercial litigation, including alternative dispute resolution and has acted as an expert in a number court and arbitration proceedings. His expertise covers general corporate/company law, banking law, finance, bankruptcy and restructuring, mining, investment, acquisitions, infrastructure projects/project finance, antitrust, and shipping/aviation, with a particular focus on corporate governance and compliance. Mr. Ganie can be contacted via phone on +62 21 831 5005 or alternatively via email at ganie@lgslaw.co.id

The New Zealand Takeovers Code (How It Works)

By Cameron Fleming

The primary source of regulation of takeovers in New Zealand is the Takeovers Code. The Takeovers Code ("Code") came into force on 1 July 2001 and its primary aim is to ensure that shareholders are treated equally and following proper disclosure are able to make informed decisions on whether to accept or reject a takeover offer.

The Code applies to New Zealand incorporated companies that has, or in the last 12 months had, voting securities listed on the New Zealand Stock Market or has 50 or more shareholders with voting rights and 50 or more share parcels. These companies are "code companies". This means that any unlisted New Zealand company with 50 or more shareholders who have voting rights and 50 or more share parcels (joint holders of shares are counted as one parcel of shares) are also caught by the Code.

The Code has a "fundamental rule" that prohibits any person:

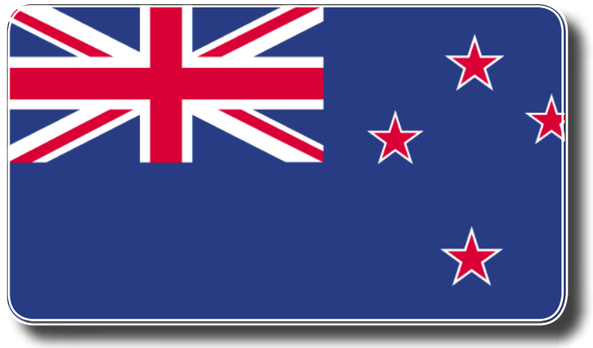
(a) who holds or controls no voting rights, or less than 20% of the voting rights in a code company from increasing the percentage of voting rights which that person holds or controls unless, after completion of the transaction, that person and its associates hold or control not more than 20% of the voting rights in the code company; or

(b) who holds or controls more than 20% of the voting rights in a code company from increasing the percentage of the voting rights which that person holds or controls.

This rule covers the acquisition of indirect shareholdings, and transactions involving transfer, and issues, of shares. It is not possible to contract out of the Code.

The Takeovers Code has a number of exceptions to the fundamental rule allowing voting securities in a code company to be acquired:

(a) under a full offer for all equity securities (whether voting or not) of the target in accordance with the Code;



(b) under a partial offer for the voting securities in accordance with the Code;

(c) under an acquisition approved by an ordinary resolution of the code company in accordance with the procedure set out in the Code;

(d) under an allotment approved by an ordinary resolution of the code company in accordance with the procedure set out in the Code;

(e) under a "creeping" acquisition, which allows a shareholder who already holds or controls between 50% and 90% of the voting rights in a code company to acquire up to an additional 5% in a 12 month period; or

(f) by means of a compulsory acquisition if the shareholder holds 90% of more of the voting rights in the code company.

The Code has detailed requirements for partial offers and full offers plus other requirements which include:

(a)**Disclosure:** The schedules to the Code set out the detailed provisions relating to disclosure for both the offeror and the target company.

(b) **Offer must be on the same terms and conditions:** An offer must be on the same terms and conditions to all holders of securities of the same class.

(c) **Independent advisor reports:** The Code requires directors of the target company to obtain a report on the merits of an offer from an adviser whom the Takeovers Code Panel approves as independent (this is done on a case by case basis). These reports are also required to address amongst other things fairness between classes.

(d) **Offer period:** The offer must be open between 30 and 90 days. A full offer can be extended up to 60 days if it is not conditional on a minimum level of acceptance or minimum acceptance conditions have been satisfied.

(e) **Minimum acceptance conditions:** Where the offeror holds or controls less than 50% of the voting securities, the offer must be conditional on receiving acceptances which will bring the offeror's total holding above the 50% threshold, unless it is a partial offer and shareholder approval for a lesser percentage is obtained.

(f) **Self-conditions prohibited:** Although an offer can be conditional, the conditions cannot depend on the judgement of the offeror or be within its power or control. This is to prevent offers being conditional on due diligence.

(g) **Variations:** The Takeovers Code does not allow offers to be varied to increase the consideration or to add a cash component to the consideration. IF the offer is carried, the variation must apply to all offerees, whether or not they have already accepted.

(h) **Defensive tactics:** The Takeovers Code restricts tactics by the target company directors which might frustrate an offer (except in limited circumstances).

The Code is regulated by the Takeovers Panel who have jurisdiction in relation to takeovers which are governed by the Code and has certain powers where it suspects a breach or intended breach of the Code. It is possible to obtain exemptions from the Code through exemption notices issued by the Takeovers Panel in relation to a particular transaction or a class of persons or transactions where the application of the Code results in inadvertent consequences or where compliance with the Code is not possible.

Currently in New Zealand there are two structural options for change of control of code companies which take the transaction outside of the Code. These are amalgamations and schemes of arrangement. The Takeovers Panel is critical of these loopholes and has sought to have the law changed.

Cameron Fleming established Cameron Fleming & Associates Ltd in 2010 after a highly successful career spanning 25 years as a partner (including as managing partner) at Russell McVeagh, New Zealand's premier law firm.

Cameron's extensive experience in corporate advisory work, particularly in the area of mergers and acquisitions, has been recognised by peers nationally and internationally. Cameron specialises in providing a wide range of advice to corporates in NZ and offshore.

He has been involved in sectors ranging from forestry to shipping, and has advised on some of the major business transactions that have shaped New Zealand's business landscape.

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Amendments to the Financial Investment Services and Capital Markets Act: Implications on Korea's M&A Market

By Kang, Hee-Chul & Lee, Hyung Ki

Earlier this year, the National Assembly of Korea passed two major amendments to the Financial Investment Services and Capital Markets Act (the "Capital Markets Act"). Although most provisions of the first amendment have already become effective, a few provisions are scheduled to take effect on 6 July 2013. The second amendment is expected to be promulgated in June 2013 and will become effective within three to six months after promulgation or on 1 January 2015, depending on the specific provision. These amendments were adopted to, among other reasons, enhance the transparency and efficiency of Korea's capital market system and develop and advance Korea's investment banking industry. Although implications of the amendments will become clearer when the Enforcement Decree of the Capital Markets Act (the "Enforcement Decree") is amended with all of the corresponding regulations, the following are some of the key features of the amendments that may provide some insights to foreign investors interested in the Korean M&A market:

A. Special Regulations Applicable to Listed Companies

The amendments have made substantial changes to the corporate financing aspects of the companies whose shares are listed with the Korea Exchange, including the following:

1. Introduction of contingent capital instruments

In general, Korean companies are allowed to issue bonds with warrants and convertible bonds. The amended Capital Markets Act will additionally allow listed companies to issue contingent capital instruments (bonds), which have loss-absorbing features such as mandatory conversion into equity or reduction or exemption of principal and/or interest subject to satisfaction of certain pre-specified conditions, and the Enforcement Decree may provide additional types and features of contingent capital instruments.

2. Prohibition of bonds with detachable warrants

In order to prevent often committed abuses of the bonds with warrants (BWs) whose warrants can be detached and transferred separately from the underlying bonds, listed companies will be prohibited from issuing such bonds with detachable warrants. Listed companies, however, will still be allowed to issue BWs with warrants that cannot be detached from the underlying bonds.

3.Cancellation of unsubscribed shares

It has been a legal and established practice for board of directors of a Korean company issuing new shares to reallocate any allocated but unsubscribed shares to its controlling shareholder(s) or third parties that are friendly to the board or management.

Under the amended Capital Markets Act, however, listed companies will be required to cancel the issuance of unsubscribed shares and may not reallocate such shares.

Nevertheless, unsubscribed shares may still be issued instead of being cancelled if they were originally issued at a price higher than the price computed based on guidelines announced by the Financial Services Commission ("FSC") and fall under one of the following: (i) they are to be purchased by an investment dealer, (ii) they are offered to existing shareholders under their oversubscription privileges or (iii) they qualify under other exceptions to be stipulated under the Enforcement Decree.

4. Public disclosure on compensations of directors and statutory auditors

Currently, listed companies are required to publicly disclose only the total and average compensation amounts of their directors. The amended Capital Markets Act, however, will require listed companies to publicly disclose the compensation amount of each individual director and statutory auditor and the specific calculation standards and methods if the amount is above the level to be specified in the Enforcement Decree within the maximum of KRW 500 million (approximately USD 450,000).

B. Abolition of the Shadow Voting System

Effective as of 1 January 2015, the shadow voting system will be abolished, which has existed in Korea since 1991 allowing the depositary to exercise voting rights of absent shareholders at a shareholders' meeting in proportion to the pro and con ratio realized at such shareholders' meeting.

C. Adoption of the Investment Banking System

1. Qualifications of Investment Banks

The second amendment adopts an investment banking system by allowing "comprehensive financial investment service providers" ("Investment Banks") to engage in certain activities beyond the general business scope of securities firms.

In order to qualify as an Investment Bank, an investment dealer or broker needs to be approved by the Financial Services Commission (FSC) after meeting the following requirements:

(i) It is a corporation defined under the Commercial Code;

(ii) It is engaged in the business of acquiring securities;

(iii) Its equity capital is equal to or more than KRW 3 trillion (approx. USD 2.7 billion); and

(iv) It satisfies other qualifications to be specified in the Enforcement Decree taking into account its risk management capacity.

2. Scope of Business of Investment Banks

(a) Prime brokerage services

Only Investment Banks will be allowed to offer to hedge funds and other professional investors the prime brokerage services such as the following:

(i) Global custody (including clearing, custody and asset servicing);

(ii) Securities lending or brokering or arranging thereof;

(iii) Financing or other provision of credit; and

(iv) Other tasks to be specified in the Enforcement Decree.

(b) Provision of credit

Investment Banks may also provide credit to companies, which will allow Investment Banks to engage in a variety of businesses such as providing takeover funds through bridge loans in M&A deals or investing their own capital in startup companies through loans and guarantees. In other words, they will be able to play more active roles in investment banking deals by sharing some of the inherent risks.

However, in order to prevent Investment Banks from turning into unsound financial institutions due to provision of excessive credits, the amendment restricts the total provided credit to 100% of the relevant Investment Bank's equity capital and bars Investment Banks from providing credit to a specific borrower for more than 25% of the relevant Investment Bank's equity capital. Investment Banks are also prohibited from offering credit to their affiliates.

(c) Other businesses under the Enforcement Decree

Investment Banks may also engage in certain activities to be allowed only to Investment Banks under the Enforcement Decree.

D. Other Notable Regulations

1. Multiple securities exchanges

Previously, the Korea Exchange had a monopoly as the only securities exchange in Korea. The amendment, however, opened up the possibility of multiple securities exchanges in Korea by adopting a permit system for securities exchanges. In conjunction with such multiple securities exchange system, the amendment also adopted the alternative trading system, which can further enhance the efficiency and competitiveness of securities exchange services.

2. Introduction of CCPs

The amendment also allowed central counterparties (CCPs), which can perform clearing and settlement of transactions regarding OTC derivatives and other financial investment products, to be established upon obtaining the necessary license.

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He has represented numerous multinational and Korean companies such as GE, Goldman Sachs, Samsung, Hyundai Motor Company and SK Telecom in M&A and corporate governance cases. He is frequently recognized by international publications such as Chambers, IFLR and Legal 500 as a leading lawyer in M&A, corporate governance and capital markets. He served as a Senior Vice President of the Korean Bar Association.

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Making Market Noise: M&A in Vietnam

By Kent Wong

Vietnam has seen an increase in M&A activity in recent years as investors view an emerging investment channel for companies both within and outside of Vietnam. In accordance with the Government's restructuring plan for strengthening the banking sector, Vietnam's domestic banks are anticipated to carry out voluntary M&As to help some of the ailing lenders and, at the same time, improve the competitiveness of credit institutions. In the past, Vietnam received FDI mainly through greenfield investments, but there has been an uptick in foreign companies investing in Vietnam by acquiring a stake in existing companies. Despite some macroeconomic instability, Vietnam has seen some significant M&A deals in 2012, which include:

Seller	Purchaser	Stake %	Company	Deal Value
Vietinbank	Bank of Tokyo	20%	Vietinbank	US$743 million
Military Bank	Viettel	8%	Military Bank	US$50 million
Bao Viet Group	Sumitomo Life Insurance	18%	Bao Viet Group	US$340 million
ANZ	Eximbank	9.6 %	Sacombank	US$80 million
Tienphong Bank	DOJI	20%	Tienphong Bank	US$30 million
Daewoo E&C	Hanel Company	70%	Daewoo Hotel	US$83 million
Nam Ha Noi JSC	Sai Dong JSC	24%	Nam Ha Noi JSC	US$114 million
Prudential	Masan Group	40%	Proconco Animal Feeds Company	US$96 million
Prime Group	SCG (Thailand)	85%	Prime Group	US$240 million
Thang Long Cement JSC	Semen Gresik	70%	Thang Long Cement JSC	US$230 million
Conoco Philips Vietnam	Perenco France	100%	Oil Field Block 15-1	US$397 million
		100%	Oil Field Block 15-1	US$615 million
		16.3%	Nam Con Son	US$287 million
Lizeroux Oil & Gas Ltd.	Soco International PLC (UK)	20%	Soco Vietnam	US$95 million
Merger Cases				
FLC Land and FLC Group				
Hanoi Building JSC Bank (Habubank) and Saigon Hanoi Bank (SHB)				US$193 million

Overview of Legislation

Currently, subject to certain limitations, foreign investors in Vietnam are allowed to freely acquire stakes in Vietnamese companies. Specific restrictions on such acquisitions are provided in both the Schedule of Commitments of Vietnam to the World Trade Organization and domestic legislation. However, until now, Vietnam has no separate comprehensive law on M&A. M&A laws and regulations are found scattered in various pieces of legislation, including the Law on Enterprises No. 60/2005/QH11 and the Law on Investment No. 59/2005/QH11 and their implementing regulations; in particular, Government Decree No. 102/2010/ND-CP, Decree No. 43/2010/ND-CP and the Prime Minister's Decision No. 88/2009/QD-TTg, which are the main laws governing business combination and which are applicable to all companies incorporated in Vietnam. If the acquisition involves shares of a public and listed company, the Law on Securities No. 70/2006/QH11, as amended by Law No. 62/2010/QH12 and Government Decree No. 58/2012/ND-CP on private placement plans and its implementing regulations will apply. Cross-border transactions will also be additionally subject to the Ordinance on Foreign Exchange No. 28/2005/PL-UBTVQH11, amended by Ordinance No. 06/2013/UBTVQH13 which will come into effect on 1 January 2014, and the WTO Commitments. In the instance, where M&A triggers an anti-trust issue, the Law on Competition must also be considered.

M&A Rules

In general, all M&A transactions are subject to the same rules set out in the Law of Enterprises and its implementing and guiding regulations, although sector-specific regulations may apply to different companies. Some of the specific rules include:

(i) A capital contribution in a limited liability company (a company not limited by shares and with no more than 50 owners) may only be sold once each of the capital owner's share of capital has been fully paid; an offer given to other members of the company who have the right of first refusal for 30 days before the capital owner may be able to transfer his shares; and the company has issued a certificate of capital contribution.

(ii) Sales of shares of the initial founding shareholders of a joint-stock company (i.e. a company limited by shares) are restricted for three years, unless the General Meeting of Shareholders consents to their sale.

(iii) An M&A transaction involving a public company, whether listed or unlisted, will also be subject to the Law on Securities and its implementing and guiding regulations.

Under the Law on Securities, joint-stock companies (otherwise known as shareholding companies or companies limited by shares) that belong to any one of the following three categories are included in the definition of a "public company":

- Companies which have made a public offer of shares;
- Companies with shares listed on the Stock Exchange or a Securities Trade Center; or
- Shareholding companies with at least 100 investors (excluding professional securities investors), and paid-up charter capital of VND 100 Billion or more (approximately USD 500,000).

All public companies must lodge a public company file with the State Securities Commission ("SSC") within 90 days from the date of becoming a public company, following which, they remain regulated by the SSC.

Sector-specific Rules

M&A transactions which involve companies in specific industries are subject to additional set regulations. In principle, approval is usually required before a business combination may go ahead. In certain industries, foreign equity is capped (for example, 30% for banking and 51% for the movie industry) and are, in some cases, subject to industry-specific approvals.

Transactions which are entered into between credit institutions established and operating in Vietnam are governed by the Law on Credit Institutions No. 47/2010/QH12, Government Decree No. 69/2007/ND-CP and several State Bank of Vietnam ("SBV") guidelines, which allow various forms of credit institutions to merge or consolidate with one bank. One form of acquisition is defined as the purchase of the entire legal assets, rights, obligations and interests of the target credit institution. Post-acquisition, the target credit institution becomes a subsidiary company of the acquirer. The acquisition requires the consent of the SBV. An acquisition by a foreign investor of a finance company in Vietnam might be unacceptable.

Means of Acquisition

Under Vietnamese law, control of a public company may be acquired through (i) an acquisition of shares or (ii) a merger.

Acquisition of Shares

The purchaser may acquire newly-issued shares of a public company by way of subscription or, alternatively, purchase the shares or share options of existing shareholders or stakeholders of a company.

The offer to purchase shares of existing shareholders in a public or listed company will trigger tender offer requirements in the following cases:

• a purchase of circulating shares which results in a purchaser with no shareholding, or less than 25% shareholding (and affiliated persons of the purchaser) passing the threshold of 25%;
• a purchase of circulating shares which results in a purchaser with 25% of more shareholding (and affiliated persons of the purchaser) purchasing a further 10% or more of the current circulating shares of the company; or
• a purchase of the circulating shares which results in a purchaser with 25% shareholding or more (and affiliated persons of the purchaser) purchasing a further 5% up to 10% of currently circulating shares of the company within less than one year from the date of completion of the previous offer tranche.

However, a purchaser shall not be required to make a tender offer in any of the following cases:

• subscription of newly-issued shares resulting in ownership of 25% or more of the voting shares in a public company pursuant to an issuance plan, approved by the company's General Meeting of Shareholders;
• acquisition of shares by way of transfer from an existing shareholder resulting in ownership of 25% or more of the voting shares in a public company, where such transfer has been approved by the company's General meeting of Shareholders;
• transfer of shares between companies within a group of parent-subsidiary companies;
• donation of bequeathing shares;
• assignment of capital pursuant to a decision of a court; and
• other cases as decided by the Ministry of Finance.

Merger

The Law on Enterprises sets out general procedures for company mergers by way of transfer of all lawful assets, rights, obligations and interests to the merged company and the simultaneous termination of the existence of the merging companies. Such procedures apply to "companies of the same type", but there is no specific official guidance on this term, and no implementing detailed regulations on the merger provisions of the Law on Enterprises of general application to public companies.

Outlook

Along with macroeconomic stability, the lack of market transparency, legal barriers and governance hurdles still seem to be the greatest concerns for foreign investors, M&A in Vietnam continues to be one of the key, effective channels for market entry. Amidst a market downturn in real estate, the growing M&A trend is expected to surge in the areas of banking, consumer goods, entertainment, IT and e-commerce, property and real estate, as a range of opportunities present themselves.

However, foreign investors looking to invest in a company in Vietnam should carefully research the country's legal framework. In addition, foreign investors must take into account that the laws and regulations governing M&A transactions are scattered and subject to registration, approval and supervision by various Vietnamese authorities, with oftentimes complicated, unclear provisions and procedures.

VCI Legal is a full-service business law firm that has been consistently ranked as one of the leading law firms in Vietnam by professional publications such as Legal 500, Global Legal Expert, KPMG Tax Director Handbook, Law Asia, Acquisition International, Asia In-House Counsel, Finance Monthly, and ACQ Global. The firm has been highly recommended for its Corporate, M&A, Banking & Capital Markets, Tax and Finance, Real Estate, Investments and Intellectual Property Management practices. VCI Legal is also well-known for successfully handling multi-million dollar commercial disputes and other contentious matters. VCI Legal was named Vietnam Corporate Law Firm of the Year, 2011 & 2012, Vietnam Competition Law Firm of the Year, 2013 by Acquisition International, ACQ Global, Finance Monthly and other international magazines and continues to be highly ranked among the top firms in Vietnam. VCI Legal advises Fortune 500 companies, financial institutions as well as SMEs on a wide range of legal issues. Our lawyers all have strong international backgrounds and extensive experience.

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A full-service business law firm with a seasoned team of professionals coupled with an in-depth understanding of the legal system, business environment, and cultural background in Vietnam.

Business category: Legal, tax, financial and corporate services
Employees in Vietnam: 25

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Snapshot: Deal Focus

Asia

SapuraKencana Acquires Seadrill Tender Rigs

Buyer: SapuraKencana
Seller: Seadrill
Value: $2.9 Billion

Malaysian based SapuraKencana Petroleum ("Sapura") has acquired Seadrill's rigs business, including its full tender rig organisation. The deal was completed for an enterprise value of US$2.9 billion, which includes cash, Sapura shares, total debt in the tender rig business, and Seadrill's future capital commitments for new-builds.

The incremental 400.8 million shares received by Seadrill today bring Seadrill`s equity holding to approximately 12% of the outstanding shares of SapuraKencana. At the closing share price of RMB3.18, Seadrill's total shareholding will have a gross value of approximately US$753 million. In addition, John Fredriksen, Chairman of Seadrill Limited, is a nominee to the Board of Directors of SapuraKencana.

Seadrill is a leading offshore deepwater drilling company. The company operates a versatile fleet of 59 units for operations in shallow to ultra-deepwater areas in harsh and benign environments.

Australasia

Fisher Funds Acquires Tower Investments

Buyer: Fisher Funds
Seller: Tower Investments
Value: NZ$79 Million

Fisher Funds have completed the $79 million acquisition of Tower Investments ("Tower") from TOWER Limited to create the largest New Zealand owned and managed KiwiSaver provider with 269,000 customers and NZ$5.5 billion under management.

Tower is the fourth KiwiSaver provider acquired by Fisher Funds in the last three years taking its market share to approximately 10 per cent. The acquisition of Tower was fully funded by bank debt, Fisher Funds existing shareholders and the addition of TSB Bank as a 26 per cent shareholder. No client funds were used to fund the purchase.

There will be a 12-month transition period. Existing Tower staff will be offered continuous employment on the same terms and conditions. Fisher Funds has the right to use the Tower brand for 12 months and will manage internal funds for Tower New Zealand for five years.

The Bribery Act 2010: Anti-Corruption Rules To Consider When Engaging in M&A Activity

By Nigel Boardman & Francesca McEwen

SLAUGHTER AND MAY

Bribery is evil and corrosive. It should be stamped out. But the Bribery Act 2010 (the "Act") is an unsatisfactory Act which has unintended consequences, including perpetuating bribery.

The Serious Fraud Office, which is responsible for enforcement of the Act, has made it clear that financial benefits received because of a bribe will not only be analysed in relation to the Act, but also considered for criminal prosecution, civil liability and forfeiture under the Proceeds of Crime Act 2002 ("POCA"), and any related anti-money laundering offences.

The effect of POCA means that the benefits of a business deal obtained by bribery will be considered criminal property. Under POCA, criminal property means property of all forms (including money) which constitutes or represents, in whole or in part, directly or indirectly, a person's benefit from criminal conduct. Criminal conduct is conduct which constitutes an offence in any part of the UK, or would do so if the conduct occurred in the UK. Therefore, if an organisation engages in bribery to allow an acquisition to occur, the whole cost of the target company could be treated as proceeds of crime. For example, if a purchaser of a $10bn business finds it necessary to pay $50 to a local official to obtain a local authority permit required to complete the transaction, and to which it is entitled, that payment could make the whole multi-billion dollar transaction arguably subject to forfeiture. This is both disproportionate and inappropriate. Such a situation would be treated differently under US law, which permits facilitation payments.

POCA also has an impact on purchasers who buy a company which has benefited from bribery in the past, even if bribery no longer exists in the entity. Revenues generated from the business in respect of which the bribe was paid may be in the target's balance sheet at the closing. A dividend, or other money, paid by the target to the buyer (as the new parent) could therefore be seized and confiscated.

The timing of a transaction is also affected by anti-money laundering legislation. In the event that during a due diligence exercise an occasion of bribery in the target is discovered, the target's advisers may have an obligation to notify the Serious Organised Crime Agency and may not be able to proceed with the acquisition until, and if, consent is granted. The delay caused by obtaining such consent could carry the deal beyond certain deadlines imposed by UK law, for example timetable provisions under the Takeover Code, and prevent the transaction from going ahead. An acquisition could therefore be stalled or abandoned because of bribery conducted by the target, no matter how small the bribery involved.

Acquiring a company which has a practice of bribery also poses a problem under the Act. Leaving aside the disadvantages already mentioned, if a purchaser buys a business which has engaged, or engages, in bribery, the purchaser will commit a criminal offence the moment that the acquisition is complete if bribery continues and "adequate procedures" to prevent bribery are not in place. Having "adequate procedures" to prevent bribery acts as a defence to the "corporate offence" under section 7 of the Act (a strict liability offence for commercial organisations which fail to prevent bribery). The "adequate procedures" must be in place at all times; the moment that a target is acquired, any bribery activity becomes the full responsibility of the purchaser. On completion, an acquirer may therefore find itself exposed to a breach of UK law if appropriate controls do not exist. The lack of a grace period, during which an acquirer could cleanse the target of corruption, is both unrealistic and unfair.

In order to comply with provisions set out both in the Act and in POCA, acquisitive organisations need to be fully informed about a target company's past behaviour and current practices. Extensive due diligence is therefore necessary, and systematic, bribery-focused investigation is encouraged by the Secretary of State. Buyers will consequently need to allow additional time and money to carry out proper risk assessments to fully understand a target's bribery exposure. However, naturally, sellers delay disclosure of any bribery issues until they have only one purchaser left in the race to buy, when most of the due diligence cost has been spent.

> *"As a result of these factors, British companies are not being included as possible acquirers of companies that have in their history an element of bribery…"*

As a result of these factors, British companies are not being included as possible acquirers of companies that have in their history an element of bribery or, where they are being included, British companies are withdrawing from the purchase process when a history of corruption is uncovered. Businesses are therefore being bought by those more likely to be willing to perpetuate the bribery practice. This is not good for the cause of anti-bribery, nor for the UK economy.

Nigel Boardman has been a partner at Slaughter and May since 1982. His broad practice includes international and domestic corporate finance, mergers and acquisitions, joint ventures, IPOs, demergers, private acquisitions and disposals, private equity, public takeovers, issues of compliance and corporate governance, investigations, insolvency, restructurings and sports law.

Nigel is ranked as a Star Individual by Chambers in its UK, Europe and Global directories. He was included by the Evening Standard in its 2012 review of the most influential lawyers in London, and by The Times in its 100 most influential people in business. Nigel was the 2012 winner of the Financial Times' Innovative Lawyers Special Achievement Award.

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Francesca McEwen is an associate at Slaughter and May. Francesca joined the firm in 2009 and has spent time working in the firm's London and Hong Kong offices. She qualified into Nigel Boardman's group in 2011, and works closely with him on a variety of corporate and commercial matters.

Disclosure in M&A Transactions: UK & US Perspectives

By Jeremy Saideman & Carol Osborne

Surprisingly, while the disclosure schedule (or disclosure letter) is one of the most significant documents in any M&A transaction, with important consequences for both the buyer and the seller, it is often prepared at the last minute and without a full understanding by the parties of its strategic and lasting importance to the deal. Whether for an asset sale or stock sale, every definitive agreement is going to contain representations of fact from the seller to the buyer regarding key aspects of the business being sold. A buyer will want those representations to cover the broadest possible spectrum of issues in a very specific way. A seller will want to give as few representations as possible, limited to key issues for the particular business being sold, and qualified in such a way that those representations only cover "material" or very important issues from a financial perspective. Negotiating the specific representations in the definitive agreement is time consuming and a high art, which is why the seller may breathe a sigh of relief when the form of the representations has been agreed and the definitive agreement seems to be approaching its final form. In reality, the hard work for the seller has only just begun. Each of those representations, once agreed with various qualifications as to materiality and scope, must be reviewed again and the disclosure schedule or disclosure letter prepared.

Why is Disclosure Important?

For the buyer, the disclosure schedule serves as the last but critical part of the due diligence process and, where the disclosures reveal some new fact or circumstance, it may also give the buyer a chance to renegotiate the price, require the seller to correct some perceived deficiency or, in extreme circumstances, walk away from the deal entirely. In deals with very short fuses (and many distressed deals need to be done virtually overnight to preserve going concern value), the disclosure schedule or disclosure letter is the best chance for the buyer to get visibility into key issues.

For the seller, the disclosure schedule, if drafted properly, can be valuable protection against future misrepresentation claims by the buyer.

Disclosures in U.S. M&A

Disclosure schedules in U.S. transactions are usually incorporated into the definitive agreement itself as integrated schedules and generally serve two different functions: either as an affirmative disclosure or as a negative disclosure. For the affirmative disclosure, the representations in the definitive agreement may have required the seller to list various things that are important to the business being sold, such as all of its customers who have orders over a certain dollar amount, all of the seller's inventory as of a certain date, or all the trademarks and other intellectual property owned by the seller.

The negative disclosure function is the opportunity for the seller to limit or qualify the representations made in the definitive agreement so that the representation matches the reality of the seller's business. This requires different members of the seller's management team to review the representations relevant to their functional area and confirm the accuracy of the representation. For example, if there is a representation that the seller has all necessary intellectual property rights to operate its business, the management team negotiating the deal may believe that statement to be true. However, the seller's IT manager might know that the license agreements for the key software packages used in the business have a certain number of licensed users and that the seller is actually over that limit. If those facts are not disclosed and the buyer has to pay for additional licenses, that cost will come back as an indemnity claim against the seller.

Disclosure schedules also need to be kept current with the seller's ongoing business operations and updated through the date on which they become effective. This is particularly important where there is a gap between the signing of the definitive agreement and the closing of the transaction.

Disclosures in U.K. M&A

Although the U.S. concept of an integrated disclosure schedule is becoming more common in U.K. M&A deals, the standard U.K. approach to the disclosure process is for a separate disclosure letter to be delivered by the seller to the buyer. The purpose of the disclosure letter is similar to that of disclosure schedule, however the disclosures tend to be more broadly stated, with the disclosure letter usually consisting of the following matters:

(i) general disclosures – consisting of information relating to the target company which would be available to any buyer searching a publicly available register (e.g., a search carried out by any member of the public at U.K. Companies House, revealing basic corporate filings made by the seller over the years, including details as to the seller's owners and directors, bylaws, resolutions and any security granted over the seller's assets). Such general disclosures are "deemed" to be disclosed to the buyer, whether or not the buyer has undertaken such searches; and
(ii) specific disclosures – consisting of matters which negate the scope of the representation being made by the seller in the definitive agreement (similar to the negative disclosures made in the U.S.). It is also common for a disclosure letter to qualify all of the representations and warranties (but not specific indemnities) in a purchase agreement.

Disclosure letters in the UK often make reference to, and are accompanied by, a "Disclosure Bundle" which contains copies of various documents forming part of the disclosure being made by the seller (e.g., the seller's financial statements or contracts entered into by the seller containing unusual terms or provisions).

Recent decisions by the U.K. courts support the view that a seller will not be able to defeat an indemnity claim by a buyer (and thereby benefit from the protection of disclosure) unless the seller has made disclosures which are sufficiently precise or "fair." "Fair disclosure" means the seller has provided the buyer with sufficient details to identify the nature and scope of the matter being disclosed against the particular representation. For example, using the IT software license scenario above, if it is indeed the case that the seller's total users exceed the number permitted under a licence, it is possible that a court would not consider it "fair" for the seller simply to include in the disclosure bundle a copy of the software license and a listing of the number of software users as this would require the buyer to form its own conclusions about the meaning of those two disclosures. Indeed, to meet the standard of "fair" disclosure, a court might require the seller to go the additional step and specifically disclose the fact that the number of licensed users had been exceeded.

Does the Buyer's "Knowledge" Limit the Need for Disclosure?

In the vast majority of M&A deals (whether in the U.S. or the U.K.), a buyer will embark on a fact finding "due diligence" exercise prior to agreeing to acquire a target company or business. During the course of such exercise, the buyer (whether directly, or through its advisors or agents) will obtain "knowledge" of the seller's business activities and some of the problems or challenges facing the seller. The definitive agreement will need to address whether the buyer will be bound by what it learned (or could have learned) during the due diligence exercise, but a seller should not rely on the buyer being so bound as an excuse to avoid a thorough disclosure exercise.

Although the U.K. position remains unclear as to whether a buyer's knowledge of the facts precludes a buyer from making a claim, the leading case in the U.K. suggests that where a buyer has actual knowledge, it may still be able to bring a claim for breach against a seller (subject to the court suspecting that the buyer has acted unfairly). In addition, imputed knowledge (e.g., knowledge of the buyer's agent) would only qualify the buyer's claim for breach where this is expressly provided for and permitted in the wording of the definitive agreement itself. This argues strongly in favour of the seller taking care to disclose fully against all representations notwithstanding the buyer's due diligence exercise.

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Legislative Trends

By Frances Watson

It is continuing to be a busy time for the legislature in Guernsey. As a jurisdiction which has financial services at the centre of its economy, flexible, modern and innovative legislation is key. Following on from the introduction of image rights legislation last year, so far in 2013 we have seen the introduction of foundations (which are intended to provide optionality to establish trust-like structures through a mechanism which is more familiar to civil law jurisdictions), proposals for an aircraft registry and proposals for the introduction of limited liability partnerships.

Changes in the Law and Their Effect

Legislative proposals which have particular affect in the M&A sector include the following:

Companies (Guernsey) Law 2008

The modern and flexible companies law introduced in 2008, has recently undergone a period of consultation. Legislation is expected to be submitted for approval in the near future. Proposed changes include greater flexibility in certain areas including company names (alternate non-Roman script names being permitted), removing the restriction on type of bodies corporate which can amalgamate and clarifying the way in which statutory squeeze out rights can be exercised.

Competition (Guernsey) Ordinance 2012 (the Competition Law)

The Competition Law came into force in Guernsey in 2012. It is administered and enforced by the Guernsey Competition and Regulatory Authority in Guernsey ("GCRA"). The approval of the regulator is required before certain mergers and acquisitions can be implemented. The types of transactions most commonly caught are share acquisitions, business sales and joint ventures. Mergers or acquisitions require the prior approval of GCRA if (a) the combined applicable turnover of the undertakings involved in the transaction arising in the Channel Islands exceeds £5 million; and (b) two or more of the undertakings involved in the transaction each has an applicable turnover arising in Guernsey which exceeds £2 million. Generally speaking, for the purposes of the test, the place in which turnover arises is determined by the location of the consumer to who products or services are provided. Special rules apply to insurance businesses and credit and financial institutions and a separate "preliminary review process" which is designed to weed out transactions warranting GCRA's further consideration under the normal review process. Although the Competition Law is closely modelled on the more established competition regime in Jersey, the turnover test is markedly different and is intended to introduce a more objective test (so that it is likely to be easier for companies to know whether or not they need approval for a merger or acquisition) and to enable GCRA to focus on local matters rather than larger international deals, with a small Guernsey component.

Takeover Code

Amendments to the Takeover Code ("Code") have also been published recently, to take effect from 30 September 2013. One of the key changes is that the Code will now also apply to Guernsey companies whose shares are admitted to trading on a UK multilateral trading facility, e.g. AIM, regardless of where the company is managed and controlled.

This means that Guernsey companies whose shares are admitted to trading on AIM and which are not currently subject to the Code because they are centrally managed and controlled outside the United Kingdom, the Channel Islands and the Isle of Man, will now have certainty that the Code applies to them and that they are subject to the jurisdiction of the Takeover Panel with effect from 30 September 2013. Such companies should familiarise themselves with the Code and consider whether any Code-like provisions in their articles should be removed, particularly if they conflict with the Code; and determine whether the changes to the Code are likely to affect any relevant transactions which may be ongoing when the changes become effective on 30 September 2013.

Opportunities that are coming up for M&A

We are continuing to see significant M&A activity in the investment fund arena. By way of example, Ogier in Guernsey have recently advised HarbourVest Partners, LLC in connection with the acquisition by HarbourVest Structured Solutions II L.P., a Guernsey limited partnership which is an authorised closed-ended investment fund, of an investment portfolio comprising private equity fund interests and direct co-investments, from Conversus Capital L.P. (a Guernsey investment fund listed on NYSE Euronext in Amsterdam). HarbourVest Structured Solutions II L.P. acquired the portfolio for approximately USD 1.2 billion, after adjustments for certain capital calls and distributions.

There appears to be an increasing desire for consolidation in the financial services sector.

We are also seeing activity outside of the financial services space such as the recent acquisition of Vets4Pets by a UK based retailer, and in the licensed gambling sector with the sale of Sportingbet to William Hill plc.

Specific Regional or Country Issues

Guernsey is again the number one jurisdiction of incorporation for non-UK entities listed on the London Stock Exchange. Assets under management and administration within Guernsey is continuing to increase quarter on quarter (the net asset value of total funds under management and administration being £276.8 billion at 31 December 2012, with total net asset values increasing by £15.4 billion (5.8%) during 2012). Both of these confirm that Guernsey is popular with promoters, managers and those seeking access to worldwide capital. Given the sheer level of activity in the financial services business we expect that M&A activity will continue in the coming years.

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Foreign Investment in Italian strategic industries: The "Golden Powers" of the Italian State

By Maurizio Delfino

Background

The Italian government has recently overhauled the rules applicable to the so called "Golden Share" which it retained in certain industries after privatisation, in order to remove the restrictions to the freedom of capital and establishment. This is the response of Italy to the infringement procedure n° 2009/2255 which in 2011 the European Commission started against Italy.

Addressing the matter means finding the appropriate solution to conflicting issues, including the desire of nation states to exercise forms of control over strategic companies while, at the same time, avoiding unjustified barriers to the entry of foreign capital or freedom of establishment.

The repealed Italian legislation was characterised by considerable generality and vagueness of scope, resulting in wide discretion to the Government, which was relatively free to exercise its special powers in corporate transactions. The system also resulted in reduced transparency.

The European institutions, meaning both the Commission and the European Court, have in past years often stigmatised and inflicted sanctions for legal provisions allowing some form of "Golden Shares" reserved to the national governments of Italy, England, France, Spain, Portugal and The Netherlands. The topic is well known within Europe and the relevant EU case-law is by now well established. Only Belgium partially escaped censorship of the European Court, which approved the relevant Belgian laws in that they: (i) provided for a tangible need of protection of the public interest, (ii) allowed opposition after the event and did not subject the transactions to the prior approval of the national authority and (iii) imposed a requirement of explaining the reasons for the decision to intervene, subject to strict judicial control. The Belgian law was therefore considered somewhat of a model for the new Italian regulations.

Basic Principles of the New Regulation: From the "Golden Share" to the "Golden Powers"

The Decree n. 21 of 15 March 2012, which subsequently was amended and incorporated in Law n. 56 of 11 May 2012, identified the industries in which the so-called "national interest" could play a role and, in the process, provided the framework for aligning the relevant Italian regulations with the principles of EU law. The statute indicated the industries to be deemed "strategic" and established new rules applicable to Italian government's powers to play a role in extraordinary transactions involving companies operating in: (i) defense and national security, (ii) energy, (iii) transport and (iv) communications.

The new statute, which is clearly destined to have a material impact on decision-making by foreign investors in Italy, is expected to be fully implemented before September 2013 (it was already implemented in the defense sector only). The statute is however already affecting the structure of transactions even in the interim period while implementing regulations are being discussed: in a recent transaction involving a major telecom operator (which has not yet completed), the target decided to spin off certain assets from the perimeter of the transaction in order to avoid possible arrest due to the implementation of new procedures provided by the new law.

The new statute provides that, upon the occurrence of certain assumptions (e.g., extraordinary corporate transactions involving companies in the so called strategic sectors), prior notice to the Government is mandatory. The purpose of the notice is to enable the Italian Government to take decisions relating to the exercise of certain "special rights" - also defined as "golden powers"- ranging from the imposition of specific conditions which will apply to the transaction, to the right of veto to closing of the transactions. Failure to comply is severely sanctioned: in case of breach of the procedure and/or the restrictions decided by the Italian Government, the following may apply: the suspension of voting rights, the nullity of acts or contracts and the application of administrative fines of considerable amount (calculated either on the value of the transaction or on the turnover of the companies involved in the transaction).

Defense and National Security

Transactions in this industry are subject to prior notification to the Presidency of the Council of Ministers, which has 15 days from notification to exercise its "golden powers". The Italian Government is entitled to exercise the "golden powers" only in case of serious harm to the fundamental interests of defense and national security. Please note that the provisions below apply to all foreign acquirers, including those from within the EU.

In the case of:

i) purchase of participations in defense companies certain conditions may be imposed with reference to the security of supply, security of information, technology transfers, export control;

ii) shareholders' or board of directors' resolutions of defense companies on mergers or demergers, transfer of business, transfer abroad of the registered office, a veto right may be exercised by the Italian Government;

iii) purchase of participations in defense companies by an entity other than the Italian state or entities owned or controlled by the Italian state, if the purchaser will come to hold, either directly or indirectly, voting shares in an amount which may jeopardize the interests of defense and national security, the Italian State may actually veto the acquisition.

Energy, Transport and Communications

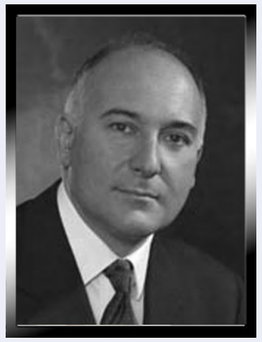
Transactions in these industries must be notified prior to closing to the Presidency of the Council of Ministers, which shall have 15 days to exercise its prerogatives. In the field of energy, transport and communications the "national interest" is less protected than in the defense sector, in that EU acquirers are not subjected to the provisions below:

i) Any resolution, act and/or operation by a company holding an asset in the above industries and having the effect of modifying the ownership or control of such assets or changing their destination (e.g., merger or demerger, transfer of business, transfer abroad of the registered office) must be notified to the Government. In the event of extraordinary situations which may considerably harm the national interest, the Italian State can express a veto and apply specific conditions or requirements on the parties to the transaction.

ii) The decision setting out the government's exercise of its golden powers must provide reasons and explain why completion of the transaction would prejudice fundamental interests of the State. The Government may veto the acquisition only in exceptional circumstances. Such exceptional circumstances may include the existence of ties between the purchaser and countries which neither recognise the principles of democracy nor respect the rules of international law, or which have undertaken risky behaviours vis-à-vis the international community and/or have relations with criminal or terrorist organizations, or persons however connected to them.

Conclusions

The new regulation governing the "special powers" of the Italian Government on extraordinary transactions in strategic industries is clearly a step forward in simplifying and making current practice on the monitoring of foreign acquisitions more liberal and easily compatible with EU law. Also, it is a significant step forward from the point of view of the certainty of the law and legal transactions. Foreign investors, including sovereign funds, are now in a position to know in advance whether, and under which conditions, the restrictions on investments in the capital of strategic companies may apply and be deemed lawful under Italian law.



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CorporateLiveWire

Changes in the Investment Promotion Act

By Dimitrinka Metodieva & Victor Gugushev

The Bulgarian economy suffered a dynamic development in recent years. Due to the low tax rates, favourable geographical location and the EU membership, Bulgaria has become a preferred destination for investment and development of new industries that were either stagnant over the last two decades, or have been lacking in resources for their development. With the accession of Bulgaria to the EU and the two-way opening markets, the economy has undergone rapid development, with both abrupt rises and recessions. However, in the view of the shaky economy in the world, the country currently has one of the smallest deficits in Europe and relatively low external debt to its own GDP.

In the past year, the number of the mergers and acquisitions, as well as their size, decreased compared to 2011. The main transactions were in the areas of agriculture, telecommunications, food and energy.

In order to overcome the decrease in the investment activity, the Bulgarian government amended an important law for the foreign investors – the Investment Promotion Act ("IPA").

The changes in IPA can be divided into four main groups:

Optimisation of the Procedure for Certification through Decentralisation & Extension of the Powers of the Municipalities for Investment Promotion

Changes of IPA aim to enable the municipalities to encourage the investments in their own region, taking into account their specific needs. In this respect, the law enables the mayor to issue a municipal certificate for investment class "C", which threshold for certification is less than the minimum for class "B", for investment projects in the respective municipality. The incentives for projects with certificate class "C" are:

- Individual administrative services including shorter terms for the services provided by the municipalities;

- Providing ownership or limited real rights without tender over real estates which are private municipal property.

Entering Of Additional Criteria for Certification of the Class of the Investments – Number of Newly Opened Jobs

The amendments to the IPA change the criteria that should be met by an investment project to receive investment class certificate. In the current legislation there were two criteria that the priority investment projects had to meet cumulatively – the investment amount and the number of new jobs supposed to be opened. The amendments provide that the two criteria could move in inverse proportion, giving priority to the creation of new jobs – lower investment, but generating higher employment. This will allow certifying projects in the services sector, where the amount of the investment is not high, but the generated employment is significant.

Introduction Of A New Incentive Measure – Reimbursement Of The Part Of The Obligatory Social Security Payments From The Investors, As Employers For Certain Periods Of Time

Another important change is the introduction of an incentive measure, which represents partial reimbursement of investors' obligatory social security payments for employees occupying new jobs. It will be applied to high-tech projects, or those implemented in areas with unemployment rates, exceeding the average for the country. The measure is applicable to small, medium and large enterprises and aims to create long-term employment - at least 3 to 5 years as of receiving of the financial aid.

This measure should be distinguished from similar measures, focused on financial support for construction of public technical infrastructure. Usually, need for such infrastructure have production companies or industrial investors planning to construct new or to expand existing facilities. The new measure is primarily targeted towards the service sector, which generates more jobs. The measures for financial support for construction of public infrastructure and the above described new measures could still be applied to industrial sector projects, but now the investor can take advantage of only one of them, appreciating his own specific needs.

The new measure itself represents free financial support for the investor to the amount of the already paid contributions for each employee appointed at newly created job. In addition to the criteria for innovation or for a region with a high unemployment rate, the projects should qualify also for investments which can obtain regional aid. It should be noted, however, that limitations of the maximum amount for financial aid per employee, and the period to which the measure will be applied are provided in the law.

In order to recover part of the obligatory social security contributions, the investor must meet cumulatively the following conditions:

- the investment is completed on time and the amount is verified through financial statements in accordance with the Accounting Act, certified by a registered auditor;

- the number of the newly opened jobs created is not less than the specified threshold;

- the annual salary of the employees in the enterprise should be higher than the average national salary for the respective business in which the investment project is implemented, according to the National Statistics Institute, etc.;

- the investor has actually paid all due social security contributions, verified by document issued by the National Revenue Agency.

Additional Measures Related to the Opportunity for Foreign Investors to Acquire the Right to Stay In Bulgaria & to Obtain Bulgarian Citizenship In Connection With Investment Projects Implemented in the Country

Sometimes the possibility for gaining right for temporary or permanent residence in Bulgaria, including the ability to acquire Bulgarian citizenship, proves to be a key element of the investment plan. The amendments in IPA create a new chapter referring to the Foreigners Act ("FA") and the Bulgarian Citizenship Act ("BCA"), in which chapter additional measures for acquiring residence right in Bulgaria and Bulgarian citizenship in connection with investment projects implemented in the country are provided for foreign investors.

The changes are associated with the expansion of the policy to encourage investments and to create opportunities for: a) equity owners, managers or procurators, key positions employees in case of performance of certified investment project; b) owners of capital (50%) in a Bulgarian company, which have made investments under the IPA and created employment above certain thresholds in certain economic activities when there is no certified investment project; c) individuals who donated at least BGN 200,000 to the National Innovation Fund to be able to acquire long or permanent residence under the FA:

There will be also an opportunity for acquiring Bulgarian citizenship under BCA, after assessment of the merits of the candidates in the economic sphere by covering some criteria related to implemented investments and opened new jobs.

In general, the new measures aim improving the investment climate in Bulgaria, development of new sectors of the economy, sustainable economic development and addressing the high unemployment in some municipalities. Investors will be able to enjoy a number of privileges, especially if their country is not a member of the European Union.

The expected results are:

•Restoring of the levels of the foreign direct investments accounted for before the global economic crisis;

•Economic growth;

•Increasing of the share of the investment as a percentage of GDP;

•Maintaining of a strong external financial position of the country;

•Creation of highly qualified employment and sustainable reduction of unemployment;

•Encouragement of the economic activity in slow regions and reduction of the regional differences in the country;

•Enhancing the role of the local government to carry out the policies for investments promotion.

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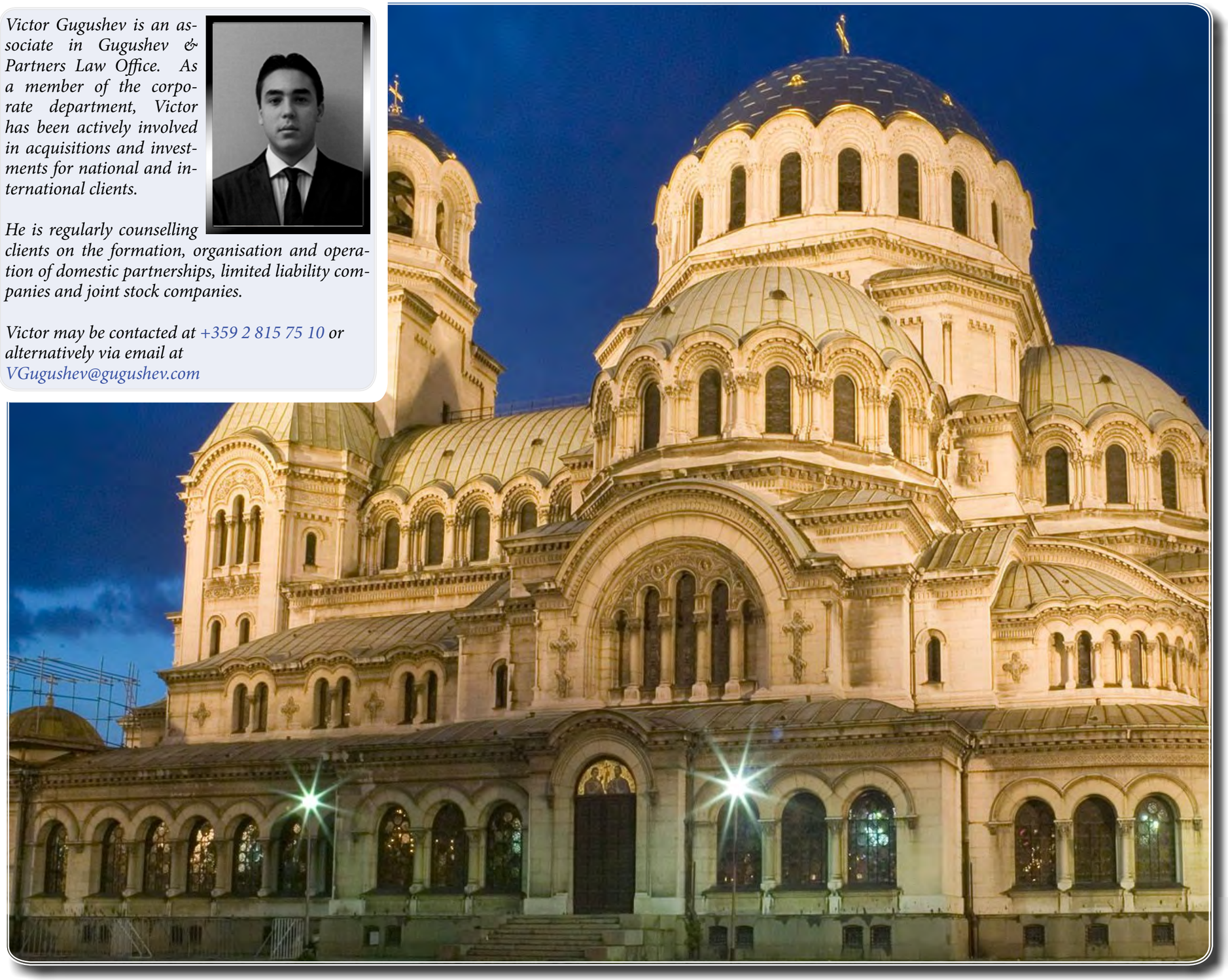


A valuable insight into M&A trends in Bulgaria

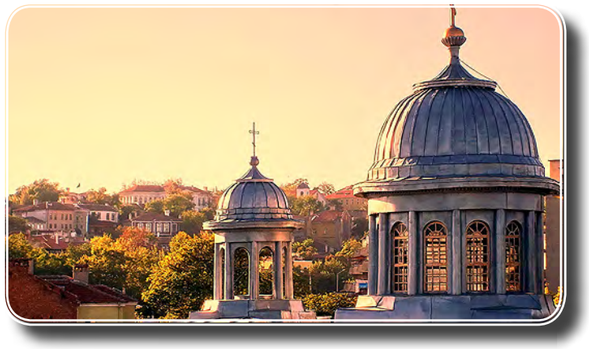
By Alexander Yankulov

Throughout both 2012 and first half of 2013, a new trend in M&A activity in Bulgaria emerged. Just like in rest of the EU, restructuring and consolidation have been the main drives behind most acquisition deals in the country. Among others, notably the role of financial institutions was raised (especially of large international banks and multinational institutions such as the EBRD) which play a key role in many consolidation acquisitions and further take increasingly the initiative to restructure distressed assets and divestures to new purchasers.

Renewable Energy: Dealing in a Difficult Time

The market of renewable energy projects has recently seen several turbulent years caused by the numerous changes in the regulatory environment bringing reciprocal response from investors and banks. In the presence of a serious investor, the investment cycle of a typical renewable energy project (including development, financing, construction and commissioning of the project) should take about one to two years (except for hydro-power projects which usually require more time), and would generally be aimed at completion before the new preferential tariff is set by the Bulgarian Energy Regulator for the respective regulatory year, as that price will be "locked in" for a term between 12 years for wind and 20 years for solar projects. For that reason, acquiring a renewable energy project was equally attractive for strategic investors with a view to a long-term investment as well as for investors who focus on a quick entry and quick exit strategy.

With the regulatory changes in 2012, the offtake price for electricity produced by renewable energy sources would be calculated as the average of the tariffs valid as at the date of commissioning of all phases of a plant instead of at the previously applicable date of completion of the physical construction of its first phase only (and this with a continuing tendency to lower the preferential tariff each year). Then came the newly granted power of the Regulator to amend the applicable tariff for new projects in the middle of a regulatory period in order to reflect the continuing downward trend of the cost of construction as well as a new "grid access" fee for producers which in some cases drained some 40% of the offtake price.



The banks quickly responded to the above described changes by gearing the debt/equity ratio (which as a rule in Bulgarian project finance is tied to the debt service coverage ratio of a project) and increasing the investor's own participation for financing renewable energy projects as well as by requesting additional collateral. Both strategic and financial investors got cautious and some decided to lend money to prospective projects instead of buying shares which reflected their decreased appetite for risk. In Bulgaria such a loan can be quickly transformed into equity with a resolution of the company's general assembly and the investor lending money may later become a shareholder in exchange of its loan.

Others managed to negotiate trade financing from their suppliers in the form of deferred payment of the price of goods and services required for the construction of a project. The way to secure the payment for a lessor or a seller of a commodity with deferred payment of the purchase price is by retaining the ownership and registration in a special register so that the lessor or seller keeps control over the commodity. This is similar to floating and non-possessory charges, the Bulgarian regulation for which (1997) follows the EBRD's Model Act on Secured Transactions.

In some cases, commercial creditors acquired assets in lieu of payment from debtors in default. In an actual transaction, an investor initially arranged a bank loan to be utilised at commercial operation date of its renewable energy projects and then balanced the late utilisation of the loan by arranging deferred payment to its suppliers and the construction company. The projects were successfully commissioned at an attractive preferential tariff. However, following the above described regulatory changes, the lending bank was less eager to finance the projects at the same rate as originally agreed and the investor was now facing the risk of delaying its payments towards the contractors beyond maturity. Therefore, the investor settled the deal by selling the projects to the construction company in lieu of payment of the price before it became overdue, and keeping the option to buy back the projects upon providing of external financing. Selling an asset with an option to repurchase is invalid under civil law, but is expressly allowed by Bulgarian law merchant, which was the applicable law in this case.

Other less lucky investors were not able to settle their deals in time and had to undergo enforcement procedures. A going-concern pledge (being a pledge over the enterprise of a company as a pool of rights, liabilities and factual relations introduced under the mentioned 1997 transposition of the EBRD Model law) enjoys private enforcement - through either appointment of an administrator by the creditor or by a direct sale of assets to a third party at their market price without the need of a court action, which makes it one of the preferred forms of providing security in Bulgaria both for acquisition finance and for project finance. Should banking finance in Bulgaria deteriorate in the following months, we will be seeing more enforced divestures and acquisitions of attractive renewable energy assets.

Previously, the business owners were unwilling to bother to pledge their asset to enable the purchaser to extend a bank loan and this was a hindrance for leveraged buy-outs. However, this attitude has changed as well, and in recent times we see transactions where the owners have been eager to grant such a pledge or sell the asset for deferred payment of the price. Nonetheless, a careful investor will keep an eye on two possible risks related to these solutions:

- There are financial assistance rules prohibiting a joint stock company to provide a loan or pledge its assets as a security for the acquisition of its shares. The transfer of shares of a limited liability company and the transfer of a going concern of either type of company are exempt from the restriction.

- With the recent implementation of an EU directive, the parties to a commercial transaction are forbidden to agree a term of payment which is more than 60 days from date of delivery of the goods and/or services or the respective invoice unless the nature of goods or services or other important reason allow a longer term. This new rule does not apply to periodic payments. The rule threatens to destabilise a large number of commercial transactions if the parties do not account for it properly. Since the rule is mostly to protect suppliers of goods and services from delayed payment, but is drafted as broadly as possible, the parties have to engage proper contract wording in order to avoid the risk of introducing contractual terms which might invalidate the contract.

Telecommunications & Media: Consolidation Is Underway

2012 and 2013 are particularly strong years for telecommunications and media deals. Two of the three active 3G mobile operators changed their owners (the one through a shares sale and the other through enforced execution - the first enforcement of a financial collateral pledge over dematerialised shares in Bulgaria) and three other companies obtained 4G licenses (one of them recently changed ownership). Dominating trend in the online media business (which so far had been operated by numerous smaller players) is the drive towards consolidation including the recent acquisition of the largest on-line media by a local media group.

Acquiring an online media has its specifics. The main assets of the company would be its reputation, know-how, the "cash cows" – the key domain names in its brand and its key employees. An experienced investor would want to acquire the media with strong covenants for keeping key employees at bay and obligations by the previous owner for non-competition and non-solicitation of customers and employees.

On-line media are not very attractive for bank financing since intangible assets are not the preferred collateral and income is sometimes volatile - advertising of gambling was banned in Bulgaria last year and so substantial revenue was peeled from web sites. Fortunately, seed funds such as Eleven or LAUNCHub (providing finance under the JEREMIE initiative of the EU) are adept to financing of start-up companies as most on-line media are.

Alexander Yankulov is an attorney-at-law at Spasov & Bratanov Lawyer's Partnership, a leading Bulgarian business law firm consistently ranked at the top places by the Chambers' and the Legal 500's guides for its jurisdiction. Alexander provides legal advice to commercial clients on a variety of topics including corporate matters, private acquisitions, bank financing and energy regulations. Alexander has key experience acting for multinational companies engaged in the production, distribution and trading of electricity and gas in Bulgaria and has consulted the restructuring of a large state-owned company in line with the third liberalisation package of the European Commission.

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M&A in Finland

By Rainer Häggblom, Markku Tynkkynen, Heidi Bergman & Kari Nerg

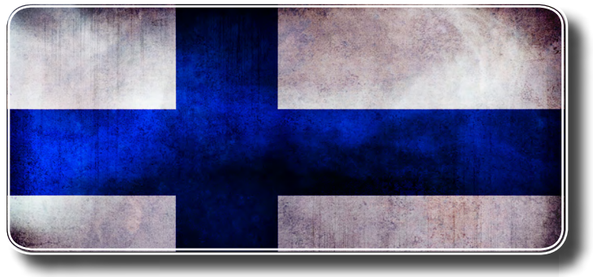
Vision Hunters is a strategic and financial advisor focused on forest industry and energy. The company has about 100 experts in international network of wholly or partly owned companies. The majority of Vision Hunters is owned by Häggblom & Partners Ltd., the founder of which is Rainer Häggblom, a renowned strategic and M&A adviser of forest industry globally.

Our network companies have recently carried several interesting M&A assignments in Western Europe, Eastern Europe including Russia and Latin America. The companies have divested their non-core assets, merged their businesses in order to materialise synergies and acquire assets at very low values. Our strength in this type of assignments is that we know the business of our clients so well that we know very well where value can be created or destroyed. In addition our systematic way of analysing and implementing synergies has benefitted our clients a lot.

The current challenge in the industry is the rapidly changing paper market. For an example in Western Europe the graphic paper demand will decline between 2010 and 2020 by 3.8 % per annum. The companies in graphic paper have during the 2000s destroyed shareholder value and will continue to do so unless they succeed in transformation.

Transformation by developing new products and making organic is very slow. The alternative to acquire new businesses may be more attractive in case acquirer is financially sound and has sufficient management capabilities.

The new businesses can be outside the traditional pulp and paper businesses for an example in energy, transport fuels and chemicals. Some companies have already made such moves quite successfully.n One trend in forest industry is the focus on large-scale businesses resulting in divestitures of small scale businesses for an example in mechanical wood industry business. The trends in packaging paper and paper boards are very different. In box board the consumption is forecast to grow by about 4 % per annum leading to about 55 million tons in 2015. Asia accounts for about 48 % of the total consumption of boxboard. Also in containerboard the global growth is healthy. The forecast increase is about 5 % per annum reaching about 160 million tons by 2015. Asia accounts for about 50 % of the global consumption.



The growth in emerging economies is one of the megatrends in the global forest industry. In Asia the fastest growth is in packaging business both in carton board and specialty papers related to packaging. Pulp production in turn grows fast in Latin America due to very good cost competitiveness. Also wood panel business in Latin America is booming. This rapid geographical change is also challenging from advisory perspective. This is the reason why we have developed our advisory skill sin Brazil, Colombia, Singapore and China. In all locations by leaders with solid expertise in the forest industry business.

When acquiring pulp and paper assets at very low prices one option is to convert the machine for new businesses. This, in general, is very difficult and requires a lot of business and technical expertise. Our advisory strategy is to have also solid technical experts on our payroll.

The industry is very dynamic and in the middle of a major transformation. We have had the pleasure of being advisors in many transformational deals such as:

- Merger of Munksjö and Ahlstrom Label and Processing division to form a world leading specialty paper producer
- Divestiture of UPM's non-core mechanical wood industry assets
- Acquisition of Weyerhauser's pulp mill to be converted into dissolving textile and acetate pulp
- Transformation of a shutdown paper mill site for a data center and other alternative businesses.

By using our services our Clients know that they will get a solid advisory services combining business, technical and financial expertise. Our teams have the best analytical tools at their disposal. The teams are very dedicated and hardworking.

Rainer Häggblom, M.Sc. (Econ.), M.Sc.(Forestry), Vision Hunters, Chairman of the Board

Mr. Häggblom has worked as an advisor in some of the largest mergers and acquisitions in the industry. In addition, he has advised a large number of transactions in the pulp, paper, paperboard, wood products and other forest industry related businesses in all continents. His strategic advisory clientele includes many of the large companies in the industry, but also smaller companies facing strategic challenges and opportunities. Mr. Häggblom currently works as Chairman of the Board of Häggblom & Partners Ltd Oy, Chairman and Founder of Vision Hunters Ltd Oy, Chairman of the Board of The Forest Company Ltd and several other mainly energy and technology companies.

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Mr. Tynkkynen has 30 years experience within the global pulp and paper industry and was e.g. member of the Executive Team and Strategy Team of UPM. He was responsible for global sourcing, wood sourcing and plantations, energy, environmental issues and corporate social responsibility. Earlier he acted also as President of the Magazine Paper Division and various leadership positions concerning sales and operations of UPM. During his career at UPM, Mr. Tynkkynen has been a member of after-merger team in all the M&As of UPM since Kajaani merger 1987. Mr. Tynkkynen has supervised several strategic projects.

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Trends on the Dutch M&A Market

By Rob Faasen, Claudine Maeijer & Jan ter Horst

The current Dutch M&A market is no exception to the other markets in Europe. Although the number of M&A transactions picked up in 2012 was not so bad, it will be a long time before it reaches the levels of 2007 and earlier years.

The number of M&A transactions reduced over the years, however the deal value attributed to companies has not changed considerably. Due to the changes in the possibilities to finance transactions and the upward pressure on prices, the number of PE transactions did not increase considerably over the last three years, although many PE firms have funds available or should make certain changes in their portfolio. In many cases, PE firms believe the prices for which companies are offered for sale are too high. It is difficult to achieve a return on the basis of the financial parameters that are presented. Increasingly, strategic parties are looking for opportunities. However, Dutch strategic parties appear to be very cautious, probably because of low profitability and the difficulties to attract financial support from banks, especially in the mid-market. This provides chances for non European strategic buyers. Many buyers appear to have deferred their decisions on potential deals, but despite various uncertainties there is a growing appetite amongst strategic partners to have transactions taking place. In addition, expectations are that PE firms will seek opportunities to strengthen their portfolio's and to have movement in their portfolio's, since certain funds are nearing their expiry dates and substantial amounts of committed capital are not invested. In the syndicated/club loans the trend is towards more non-Dutch financial institutions providing financing for transactions. US based financial institutes appear to be more successful on that market than European Banks. Banks who would like to keep their shareholders happy will try to increase their margins and profitability for which supply of credit on the M&A market appears to be still the most favourite.

Although we have the impression that most of the transactions that are completed on the Dutch market are still based on a 100% acquisition of shares, some M&A specialists (probably mid-market) identify a trend that the structure of a transaction is no longer primarily focused on a 100% transaction at completion, but on a "phase out" scenario. Reasons are to ensure that the expectations of the purchaser with respect to the target, the purchase price and other relevant aspects will be realised. If that is not the case, this could affect the level of the deferred consideration that a purchaser is prepared to pay for the remaining portion of the shares.

In any event potential purchasers are more cautious in preparing a transaction and more emphasis is put on due diligence, financial and risk analysis. We experience more potential purchasers who decide not to proceed with a transaction, than some years ago. Purchasers are less prepared to take risks to achieve a return on the investment that they are making. Post completion integration gets more and more attention in an earlier stage of the transaction (preferably while the due diligence investigations are conducted) in order to avoid the disappointment of not fully realising the value of an M&A transaction.

As an alternative for traditional escrow arrangements in M&A transactions also in the Netherlands an increasing number of transactions include W&I insurances taken out by (primarily) the seller. This type of insurance has certain advantages for the seller. The seller will balance the costs of such W&I insurance against the alternative that a substantial part of the purchase price remains reserved in escrow and that, no return or almost no return is made on such escrow (especially because interest rates are almost non existent). Although representations and warranties in an M&A transaction will need to be at "at arm's length" basis, these types of insurances create a more flexible attitude of a seller towards the number of warranties that a purchaser requires and a seller is willing to give.

Recent Developments in Law Relating to M&A

On 1 October 2012, the Act on the simplification on the corporate law applicable to private companies with limited liability (Flex-BV wet) came into effect. That new legislation did abandon a number of mandatory provisions in Dutch law. Consequently, nowadays articles of association and shareholders agreement can be made much more tailor-made to the wishes of the stakeholders in a Dutch private limited liability company. It is e.g. now possible to have non voting shares. This new legislation creates much more flexibility and adequate opportunities for shareholders to include in their agreements all relevant matters (such as issues as corporate governance, and financing) rather than in the public articles of association of the company.

Furthermore, the Management and Supervision Act (Wet Bestuur en Toezicht) entered into force as of 1 January 2013. Changes include: a new statutory basis for a one-tier board system, limitation of board positions, a change in the conflict of interest rules and restrictions on supervisory positions.

The Financial Markets Amendment Act 2013 (Wijzigingswet financiële markten 2013) contains amendments based upon which the Dutch public offer rules changed.

Contracts in The Netherlands are not only interpreted in accordance with the literal wording of a contract, but also on the basis of the intention of the parties and the rules of reasonableness and fairness. The Supreme Court ruled on 5 April 2013 that commercial contracts (which include M&A contracts) should be interpreted applying the so called Haviltex principle; statements made before the entering into an agreement are also relevant to interpret the terms and conditions of commercial contracts besides the contractual wording chosen by the parties. A so called "entire agreement" clause in a contract will not affect that principle.

"As an alternative for traditional escrow arrangements in M&A transactions also in the Netherlands an increasing number of transactions include W&I insurances taken out by (primarily) the seller."

When the transaction meets certain criteria Dutch merger control regulations will apply and the transaction cannot be consummated before it has been notified to the Dutch merger control authority (NMA).

Unlike the NMA argued earlier, a purchaser (and the target company) is required to notify the NMA of an intended concentration before completion.

If that obligation is not observed, the NMA can impose a fine on the purchasing party only, but not on the selling party as it did in the Pacton case. This interpretation is in line with European notification rules.

Furthermore the Dutch Consumer Authority, Netherlands Competition Authority and the Independent Post and Telecommunication Authority (OPTA) have combined their forces into the Authority Consumer & Market (ACM) as per 1 April 2013. The ACM is quite active. Recently it has imposed a fine of EUR 500,000 in the Bulters case, because no notification was made.

Rob Faasen

Rob Faasen (1961) started his career in 1988 and has founded Eversheds Faasen in 2002. He is a corporate M&A partner. Eversheds Faasen has offices in Amsterdam en Rotterdam.

Rob is often consulted to advise on strategies concerning domestic or cross border (M&A) transactions or structures corporate governance and regulatory/compliance issues. This includes strategic challenges that boards of companies face in a world which become more regulated. As a corporate M&A partner by profession, he leads (international) teams in relation to a wide range of transactions, including M&A, joint ventures, re financing, MBO's, LBO's and controlled auctions. With his entrepreneurial background regularly Rob discusses strategies and policies with the management of companies and general counsels, not necessarily relating to only legal issues.

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Claudine Maeijer

Claudine (1965) started her career in 1991 and was one of the incorporators of Eversheds Faasen in April 2002. Claudine Maeijer is Partner of the Corporate M&A Group in the Rotterdam and Amsterdam office. Claudine specialises in corporate and commercial law with a strong emphasis on (cross border) M&A, private equity, due diligence, mergers, de-mergers, reorganisations/restructuring and alliances of various kinds (joint ventures, shareholder agreements). She also advises on corporate governance issues. Besides she has a focus on healthcare and acts for several entities in this area.

Claudine is a member of the Eversheds International M&A Group and the International Diversified Industrial Sector Group. Over the past years Claudine has acted in a number of more complex transactions and files and developed a strong relationship with clients.

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Jan ter Horst

Jan (1964) read law and did a phd on Discourse Analysis and Argumentation Theory at the University of Amsterdam. He started his career in 1991 at Nauta Dutilh. Jan joined Eversheds Faasen in 2004 as Corporate Partner en has been appointed as Managing Partner in 2009. In the interim period Jan gained invaluable insight working as General Counsel for KLM Royal Dutch Airlines amongst others.

Jan specialises in corporate and commercial law and gets instructed on a broad range of matters such as cross border transactions, M&A, MBO's, due diligence, Private Equity, joint ventures, refinancing and shareholder disputes.

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Snapshot: Deal Focus

Europe

Royal Dutch Shell Buys Repsol LNG Assets in Americas for $4.4 Billion

Buyer: Royal Dutch Shell
Seller: Repsol SA
Value: $4.4 Billion

Royal Dutch Shell Plc (RDSA), the world's largest supplier of liquefied natural gas, agreed to buy LNG assets from Repsol SA (REP) for $4.4 billion in cash to expand in Latin America and Spain.

The deal, which helps the largest oil company in Spain avoid a credit-rating downgrade to junk, gets Shell export capacity in Peru as well as in Trinidad and Tobago, The Hague-based company has said. Shell will take over financial leases and assume debt, bringing the transaction's total value to $6.7 billion. Repsol's Canaport terminal in Canada, which imports gas into North America, was not sold.

Royal Dutch Shell, which sits on an oil and gas throne that is only slightly lower than that of number one oil company Exxon Mobil, has worldwide reserves of 14.2 billion barrels of oil equivalent.

Europe

Benckiser to Buy D.E Master Blenders for €7.5 billion

Buyer: Benckiser
Seller: D.E Master Blenders
Value: €7.5 billion

In one of the largest takeovers in Europe so far this year, German consumer products conglomerate, Joh. A Benckiser ("JAB"), have acquired D.E. Master Blenders 1753 ("Master Blenders"), a European coffee and tea company, for €7.5 billion.

Representing JAB's third coffee acquisition since they invested a 12.2% stake in Master Blenders during their first foray into the market in July 2012, the Company also acquired Peet's Coffee and Caribou Coffee Company in separate deals for a combined $1.3 billion.

Its latest takeover represents a different strategy, as it will take on the likes of Nestle in the $116 billion global coffee and tea industry by expanding the Western European operations of the Dutch owner of Douwe Egberts coffee and other brands. The company is also looking at expanding in emerging markets through acquisitions. JAB, an investment vehicle for the wealthy Reimann family of Germany, also owns well-known brands like Jimmy Choo shoes and Sally Hansen nail polish.

Can The New Law Resolve Certain Transactional Elements?

By Mohamed Khodeir

Historically in the GCC there has been a market perception that certain provisions of company laws pose certain impediments to transactional activity.

A non-exhaustive wish-list of relief from impediments under the Qatari Commercial Companies Law might include such matters as:

1. Having a comprehensive executive regulation accompanying the Commercial Companies Law to support detailing and interpretation of procedural elements that are not typically covered by the law.

2. Adding layers to the capital structure of companies to include allowing for authorised but unissued capital in order to facilitate flexible capital developments of a company.

3. Addressing tranches in offering of shares to the public.

4. Prescribing forms of mandatory insurance for directors' liability.

5. Allowing private placements to be regulated.

6. Various other concerns that are discussed below.

The foregoing list is obviously a brief outline of examples of certain provisions that are either specifically not addressed under the current Commercial Companies Law applicable in Qatar, as amended, or that require bolstering in order to address the typical concerns encountered during execution of transactions.

Before analysing whether or not the draft new Commercial Companies Law (the "New Law") addresses concerns that are dealt with in other constituencies, it is important to touch on a key paradigm that is typically debated as a result of Qatar, along with other GCC jurisdictions, being a legal market in which lawyers originally from other jurisdictions operate.

This paradigm can be summarised as the distinction between more sophisticated markets that have evolved their company laws over many years and have shaped practices which are somewhat complex when compared to the local practice in Qatar. This is a fact driven by the actual nature of the market in Qatar as an evolving one, even though it maintains a solid economic position, in many instances much more solid than other sophisticated legal jurisdictions.

This dimension is important to understand before attempting to criticise the company law regime in Qatar or postulate arguments that promote ideas of simply importing provisions that are applicable in other jurisdictions without taking into account the nature of Qatar legal regime. As a developing legal market with different requirements and within a civil law jurisdiction, which has distinctive features from common law jurisdictions, it is necessary to adopt an actual understanding of the same.

With this in mind, having analysed the proposed amendments under the New Law one can highlight the following improvements that are clear under the provisions contained in the New Law:

1. The Qatar Financial Market Authority (QFMA) has been tasked by law as the regulatory authority responsible for supervising securities activities, and in particular public offering of shares and equity and debt capital market transactions in general. The QFMA has been explicitly incorporated by reference as the regulator responsible for capital markets transactions, under the New Law. Furthermore, certain provisions such as those dealing with governance have been delegated to the QFMA regulation to administer. This should assist in harmonising applicable rules in respect of transactional activities given that the Commercial Companies Law does address some of the aspects governed by the ambit of the QFMA.

2. The ownership of listed shares has explicitly been recognised to be in accordance with central registration system as per regulations of the QFMA. This amendment has relieved the overlap between the previous position requiring share transfers to be recorded on the share ledger without explicit reference to listed companies having a different transfer procedure.

3. The process of evaluation of shares in kind has been amended to accept the evaluations submitted by financial valuation houses rather than the court process that was the process required by the previous law. Again this is expected to be a breakthrough in valuation procedures to mitigate the customary dilemma of price expectations underlying the valuation process.

4. Shariah compliance sukuks have been recognised explicitly as debt instruments that joint stock companies may issue.

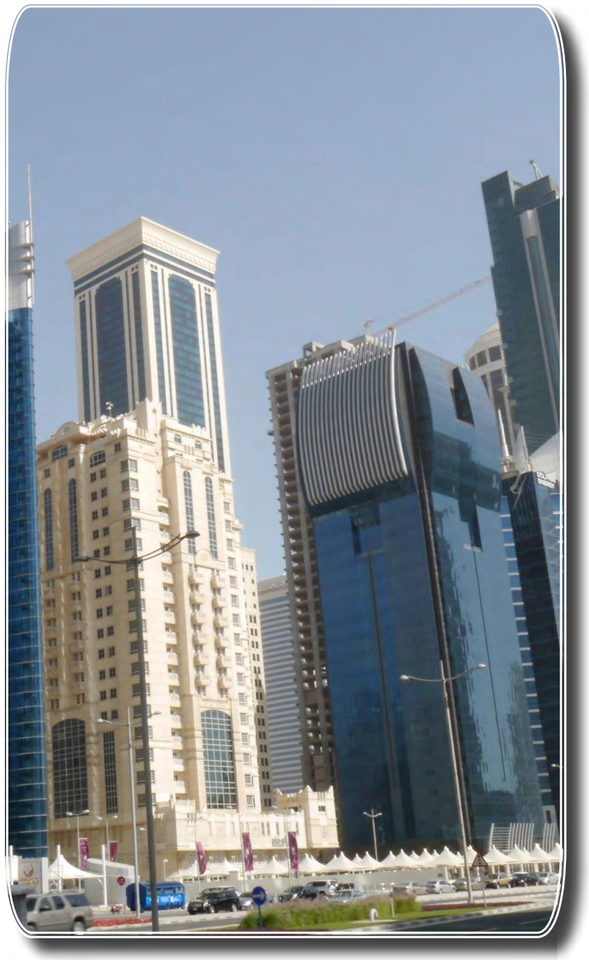
5. Achieving distributable net profit not less than 10% of the capital of the company is no longer required for transformation into a public joint stock company.

6. Buy back of shares is now also explicitly permitted.

7. Waiver of pre-emption rights that original shareholders are awarded in respect of any capital increase of joint stock companies is now being permitted under the New Law where it was previously restricted. This amendment should assist in facilitating private placements to private investors.

When comparing certain items of the wish-list, with the actual amendments proposed under the New Law, one would say that the New Law has provided certain relief measures to some transactional barriers that have been the cause of much debate within the market. However, not all wish-list items have been addressed in reality. Moreover the key factor that will determine the effectiveness of the amendments proposed under the New Law will be the implementation machinery put into place by the Ministry of Business of Trade (MBT).

In closing it is to be observed that notwithstanding the new provisions that relieve certain matters, the same will not be effective in the absence of effective implementation machinery being put into place, which as we understand is being planned for by the MBT.



Mohammed Khodeir is Partner and Head of Office of Al Tamimi & Company's Qatar office. Prior to joining Al Tamimi & Company, Mohamed practiced law in Egypt from 1999 until 2004 with one of the oldest and leading law firms, then in Kuwait with an international law firm from 2004 until 2006. Prior to moving to Qatar Mohamed headed the firm's regional IPO practice from Dubai where he was based for six years.

Mohamed has a diversified practice in advising and representing corporate, institutional and government GCC and international clients on different areas of law including: company, securities, banking, tax, labour, litigation (and ADRs), civil and commercial law matters, regulatory compliance, insolvency laws and settlements, in addition to being involved in legislation drafting.

Mohamed has been extensively involved in major M&A and IPO deals in the UAE, which are currently his principal areas of practice along with corporate governance and family businesses along with general corporate advisory work.

Mohamed has been selected in the IFLR1000 2013 directory as one of the leading lawyers in Qatar and previously selected (2008, 2009 & 2010) in the Asia Law Leading Lawyers Survey, a survey conducted by voting amongst clients and legal experts, as one of the leading lawyers in the area of "General Corporate Practice".

His experience includes advising:

- *Designed and supervised the implementation of a major cross border corporate restructuring project of a GCC conglomerate worth over US $500m;*

- *Advised an oil services company in respect to a major settlement agreement worth over US $200m;*

- *Advised on IPO deals, with offering value worth over US $300m;*

- *Led numerous M&A deals worth over US $200m; and*

- *Designed and implemented miscellaneous governance structures and acted as counsel for major family businesses restructuring.*

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Israel's Government Introduces Reform to Economy: M&A Opportunities in Israel for Foreign Investors

By Dr. Amir Shavitzky

The newly formed Israeli government is bringing forward legislation intended to reduce the over-concentration of ownership of major Israeli corporations: If adopted into law by Israel's parliament, major financial and non-financial institutions will need to be sold by their existing owners within a brief window. Reform will bring significant changes to the Israeli market and create investment opportunities for foreign investors.

In recent years there has been growing concern within Israel at the tightly held structure of the major corporate groups in the Israeli economy. Amongst the problems that this is perceived as bringing to the economy are a lack of competitive pressures and artificially high barriers to entry in certain industries, lack of consumer choice and a resultant high cost of living. Amidst such concerns, the Israeli government established an inquiry in October 2010 -- the Committee on Increasing Competitiveness in the Israeli Economy (the "Committee") -- to examine the issues.

The Committee's final report was submitted on 18 March 2012, and adopted by the government on 22 April 2012. The Committee concluded that the Israeli market is substantially concentrated and made several recommendations to reduce the concentration. Of these proposals, the most prominent are the following:

1. Ownership and control limits for financial and non-financial entities

Significant non financial entities will not be permitted to control significant financial entities, and will only be permitted a maximum shareholding of 10% in such companies. Where a significant financial entity has no controlling shareholder, then the maximum permitted holding by a significant non financial entity will be 5%.

The Committee defined a **financial entity** as a banking institution, settlement agent, insurer, management company, unit trust manager, an index product provider or a portfolio manager, while a **significant financial entity** is defined as a financial entity with more than NIS 40 billion (approximately USD 11 billion) of assets, taking account of all the assets of its controller and its subsidiaries. Although the Committee considered creating a separate definition for unit trust managers and portfolio managers, based on a different asset size, because of the sharply divergent nature of their business and asset base compared to banks, ultimately, the Committee went for a unified definition for the sake of simplicity.

A **significant non-financial entity** is defined as an entity that is not a financial entity which either: (a) generates sales in Israel in excess of NIS6 billion (approximately USD 1.6 billion); or (b) has domestic credit within Israel in excess of NIS6 billion.

Business groups which currently own a stake in both a significant non-financial entity and a significant financial entity will have four years to comply with the Committee's recommendations.

In addition, the Committee recommended that where a person or someone affiliated with him controls a significant non financial entity, that person will not be permitted to serve as a director of a significant financial entity. Furthermore, there will be reporting and disclosure requirements to ensure proper oversight, implemented by the relevant regulators. Financial penalties and criminal liability will fall upon anyone breaching the rules mentioned above that prohibit cross holdings, control and director appointment ties between significant financial entities, significant non-financial entities and their controllers, once the transitionary period has expired.

All of these recommendations, together, are intended to increase competition in the Israeli economy.

2. Limitations on the hierarchy within a corporate group

A limit on existing corporate pyramid structures to three levels. A corporate pyramid is a mechanism which separates cash flow rights and voting rights, and which in turn enables a party to control corporate assets while contributing only a minority of the equity capital funding these assets. The Committee decided that newly created pyramids should be limited to two levels.

The government is leaning towards imposing the two level pyramid restriction also on existing corporate structures and not just new corporate structures, therefore going further than the Committee suggested. In this area as well, a four year transition period is being proposed.

3. Granting rights in public assets

The imposition of obligations upon government entities which allocate rights in or to public assets to private entities to have regard to competition concerns. In making their decision, government officials will need to consider issues surrounding the possible concentration of control over important basic infrastructure and to identify concerns of the creation of entities that are too big to fail. In addition, the Committee recommended that governmental authorities will have a duty to consult with the Antitrust Commissioner, amongst others, where the economic value of the asset exceeds NIS 150 million.

4. Control of Systemic Risks

The Committee also looked at systemic risks in the economy arising from high levels of credit and loans being concentrated in the hands of a few large corporate groups, and recommended that the regulators responsible for supervising financial entities should undertake regular stress testing to examine the ability of their market sector to withstand various systemic risks.

The Committee's recommendations are intended to increase competition in the Israeli market, and to promote market efficiency and financial stability. As noted in the Committee's final report (page 5):

"The members of the Committee see great value in the contribution of foreign investors to the economy of the State of Israel, and hope that the Committee's recommendations will encourage the continued or increased activity of these investors in the Israeli economy."

If the Committee's recommendations are adopted into law, non-Israeli investors have an exceptional opportunity to enter the Israeli market. We believe that business groups subject to the new legislation will look to sell their Israeli assets ahead of the proposed four year deadline in order to avoid a situation where they will be required to dispose of their assets. Ultimately, corporate Israel will have a more diverse ownership structure, leading to a more competitive and open marketplace.

Dr. Amir Shavitzky, Partner

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General Review of Real Estate Acquisitions in Turkey

By Gur Law Firm

Real estate acquisitions by foreigners had been a subject matter of some restrictions for a time in Turkey. In conjunction with Articles 35 and 36 of Land Register Law dated 1935[1], it became possible for foreign real persons to gain the property right of an immovable property under the "principle of reciprocity". However, Articles 35 and 36[2], which render the principle of reciprocity compulsory, were abolished from the Land Register Law as of 3 May 2012. Thereby, a foreigner and a Turkish Citizen became equal on acquiring an immovable or the right in rem. Although the principle of reciprocity was abolished, there are some main restrictions within the Land Register Law, which are mentioned below.

Innovations of Amended Articles 35 And 36

a. Article 35 of the Land Register Law:

Pursuant to Article 35 of the Land Register Law; foreigner real persons may acquire immovable properties and rights in rem in Turkey complying with the following terms and conditions:

- International bilateral relations,
- Country benefits,
- Foreign countries' citizens which are determined by Council of Ministers of TBMM.[3]

By the new Article 35 of the Land Register Law, the total area that foreigner real persons may have the right to acquire and rights in rem is 10% of surface area of the district subject to private property and 30 hectares per capita in country wide. Before the amendment, it was provided that the maximum total area which a foreigner real person could acquire per capita was limited to 2.5 hectares within the scope of the principle of reciprocity. In addition to this, Council of Ministers is entitled to double the acquirable total per capita. Should the country's need arise, Council of Ministers is also entitled to determine, limit, detain or prohibit, in whole or in part, the acquisitions of immovable properties and rights in rem by foreigner real persons- and also legal entities- as "country", "person", "geographical region", "time", "number", "rate", "type", "qualification", "surface area" and "amount".

i. Obligations of the Foreigner Real Persons within the scope of real estate acquisition:

The new Article 35 provides a set of obligations such as follows:

• The foreigner real persons are obligated to submit their projects concerning the acquired immovable property to the approval of the related Ministry within 2 years. Foreign real persons, who fail to submit their projects to the approval of the related Ministry within 2 years, have to liquidate the immovable within 1 year. In case of failing to liquidate the immovable within 1 year, Ministry of Finance will fulfill the liquidation and the cost of the immovable will paid to the owner of the right as a conclusion.

• The foreigner real persons who breach this Article 35, use their projects against the purpose of the acquisition of the immovable and fail to fulfill their projects in due of time shall also be subject to the same enforcement as we mentioned above.

• The immovable and the rights in rem that are acquired by inheritance and that are over 30 hectares, i.e. in breach of the Article 35, shall be subject to liquidation.

ii. Ministry's Role during the Acquisition:

• Confirming the purpose of the acquisition of the immovable properties or the rights in rem,

• Determining the starting and the end time of the Project,

• Accepting/ denying the Project,

• Sending the affirmed Project to the Directorate of Land Registry that the immovable exists,

• Following-up the Project whether it is fulfilled.

iii. Military Zones:

Pursuant to both Articles 35 and 36; the area on which the immovable property located is determined whether it is in Military forbidden zones, military security zones or strategic zones in Turkey. Reserving the provisions of other private laws[4] ; the requests to acquire the immovable properties existing in Military Zones are subject to approval of the relevant Ministry.

b. Article 36 of the Land Register Law:

Pursuant to Article 36 of the Land Register Law and concerning the companies that are established in Turkey: In case

- The shareholders of these companies are foreign real persons[5],
- their shareholders of these Companies who are foreign legal entities incorporated under to the laws of the foreign countries and international institutions- directly or indirectly have 50% or more shares or the power to appoint or discharge the majority of right to manage, then such persons may acquire immovable properties or rights in rem in order to perform the main activity of the company provided that the companies shall perform their subjects of activity stated in their Articles of Associations.

On the other hand, immovable properties acquired by the banks for the debt collection or credit transactions within Banking Law cannot be enforced within the scope of this Article 36.
Accordingly, immovable properties or rights in rem acquired and used against this law shall be subject to liquidation by the Ministry of Finance and the cost of the immovable will be paid to the owner of the right as a conclusion of the liquidation.

The above summarised arrangements made it much easier for foreign real persons to acquire immovable properties in Turkey and the real estate acquisition by foreign persons are publicly welcomed. The arrangements have been continuously having positive impact on the Turkish real estate sector. Foreign investment on real estate sector in Turkey has been increased significantly especially from the Gulf countries.

On the other hand, immovable properties acquired by the banks for the debt collection or credit transactions within Banking Law cannot be enforced within the scope of this Article 36.

1 - Land Register Law; numbered 2644, dated December 22nd 1934, published in Official Gazette with the number of 2892.

2 - The Article 36 of Land Register Law entered into force on August 19th 2012

3 - Grand National Assembly of Turkey.

4 - Pursuant to the Article 9 of 'Code of Military Forbidden Zones and Security Zones', number 2565, dated December 18th 1981; foreign real persons and legal entities cannot acquire immovable properties in these zones. It is researched whether the acquisition is suitable for the security of Turkey.

5 - Referring to the Article 28 of Turkish Citizenship Law, number 5901 and dated May 29th 2009; the foreigner real persons who obtained permission to go abroad and forfeited the citizenship right are excluded pursuant to Land Registry Law.

Snapshot: Deal Focus

Middle East

Mubadala invests $2 billion in EBX Group as part of strategic partnership

Buyer: Mubadala
Seller: EBX Group
Value: $2 billion

Mubadala Development Company ("Mubadala"), the Abu Dhabi-based strategic investment and development company, and Mr. Eike Batista, the founder of EBX Group ("EBX") of Brazil, have announced the signing of a strategic partnership agreement.

Under the terms of the agreement Mubadala will make a US$2 billion primary investment in exchange for a 5.63% preferred equity interest in Centennial Asset Brazilian Equity Fund LLC and other offshore holding companies of Mr. Batista. The proceeds of Mubadala's investment will be used to reinforce the group's already strong capital structure so as to help fund new enterprises across multiple business areas including recently announced partnerships by EBX. Mubadala's investment is structured as a preferred equity security that gives it, in addition to certain rights and protections consistent with a minority investment of this size, a 5.63% economic interest in EBX including an indirect interest in both its publicly listed holdings.

Middle East

Bahri buy Vela International Marine for USD 1.3bn

Buyer: Bahri
Seller: Vela
Value: $1.3 billion

Saudi Arabia's shipping company Bahri has agreed to pay some USD 1.3 billion to buy sector player Vela International Marine, part of state-owned Saudi Arabian Oil Company, or Saudi Aramco. Bahri, formerly The National Shipping Company of Saudi Arabia, or NSCSA, will pay $832.75 million of the purchase price using it cash reserves and the remaining amount – via a share issue. It will issue 78.75 million new shares, priced SAR 22.25 piece, towards Vela's shareholders. Thus, Vela will secure a 20% ownership in Bahri.

Following the merger, Bahri will own 32 very large crude carriers (VLCCs), five product tankers, four roll-on/roll-off (RoRo) unit and 16 new buildings. In addition, Bahri will be the exclusive provider of crude oil shipping services to Saudi Aramco. The two parties are also considering an expansion to their alignment in the maritime sector.

Earn-out: Friend or Foe?

By Kenneth H Marks, CM&AA

Good news… Middle market M&A is active… But it could be better! There is literally hundreds of billions of dollars in both debt and equity seeking to fund deals for companies with revenues between $5 million and $1 billion, the large majority of which are less than $150 million. In the U.S. there are approximately 300,000 companies that fall within this segment, primarily owned by baby boomers, Gen Y'rs and private equity funds.

The Value Gap

Here's the challenge - most of the companies on the lower-end of the middle market are not prepared for a transition of ownership or to accept institutional money. This manifest itself as a disconnect between the value expectations of the owners and the market value assessed by institutional and corporate investors. To some degree this problem has existed for many years, but this "value gap" has been exacerbated recently.

The root cause of this disconnect is multifaceted and likely includes the lack of alternate investment options post-transaction for the current owners; inability of the company to generate a return greater than its real cost of capital; inadequate reinvestment by the current owners to assure the relevancy of their business in the future; and sub-industry operating performance. Of course there are others.

This value gap is a real impediment to getting deals done and continuing the flow of capital and job creation within our economy. On a long-term company-by-company basis, it can be addressed and rectified (at least in many cases), but in the short-run what can you do when you have an active deal and need to get movement; and how do you bridge or close the gap to get a seller to say yes and to mitigate the risk of over-payment for the buyer?

Let us assume that those involved in selling a company are doing the basic blocking and tackling in the sale process, and have multiple parties at the table to assure a competitive situation. From an external perspective – and on the front-end of the selling process – owners should seek to understand their post-transaction investment plan. This will help define the after tax needs of the owner and increase their confidence by quantifying their walkaway point. In many cases, this planning step needs to be coupled with a clearly articulated growth strategy and investment opportunity for the buyer. If the growth strategy is not fully implemented and evidenced in the current financials, the buyer will not want to pay in advance for what might happen. Thus part of the value gap.

The Earn-out

A common technique (as part of a total solution) to bridge the value gap is implementation of an earn-out. In a sale transaction, an earn-out is contingent consideration based on some future performance of the business or upon achieving certain milestones. Unfortunately, earn-outs have gotten a bum-rap, in part, because they have been improperly structured. No question that there are risks associated with them. Nonetheless, they provide a practical way to capture some of the unrealised future performance of a company. To make the earn-out really beneficial, it is helpful to directly align it with the growth strategy and expected performance of the company.

Take for example a scenario whereby a company has made an investment to enter a new market or expand into a new geography. This type of investment usually results in a hit (or reduction) to operating income in one year (probably the trailing 12 months prior to the sale) with expected future revenues and profits that have not been realised. There is likely a pipeline of identified opportunities or other sales activity to evidence the investment. In some instances the negative impact to the income statement can be negotiated-out as part of adjusted EBITDA, but it still does not capture the positive impact to the value of the business. A solution might be to structure an earn-out based on realisation of anticipated revenues represented in the pipeline.

Structure

The structure of the earn-out can make the difference between a negotiating throw-away and realising actual value as part of the transaction. An earn-out should be structured so that both the buyer and seller win as the performance of the selling company is achieved. Here is a list of key concepts and practical suggestions to keep in mind;

1. Earn-outs generally work when the key personnel (who are owners) of the company will be actively involved in the operations of the business post-closing. The event or performance metric used in the earn-out should be under their control and scope of responsibility after the deal.

2. In general, use of a metric that is higher-up the income statement is better. A revenue-metric is usually better than a net income or EBITDA metric because net income and EBITDA can be manipulated (intentionally and unintentionally) by the buyer or circumstances. A compromise might be the use of gross profit as a measurement, providing clear delineation of what is attributed to costs of goods or services. Alternatively, use of an operational metric vs. a financial metric may be easier to track and more meaningful.

3. Set the beginning level of the measurement relatively low and realistic. A key to successfully negotiating this element of the earn-out is to understand how the buyer is valuing the company and what assumptions he made. The earn-out needs to be attainable on the low-end and provide for additional consideration in the event of higher performance.

4. Provide for scaled or linear earning of the earn-out so that achievement is not "all or nothing". The exception to this is inclusion of what might be deemed a binary event; such as winning a major contract that has already been bid before closing and the win-determination will not be known until after closing. There may be both strategic and financial value in such a win that should partially accrue to the seller.

5. Make the earn-out period relatively short. One to two years is typical; much beyond this becomes speculative.

6. Schedule payments against the earn-out at least annually, or more frequent if possible. This allows early resolution of any misunderstandings in the calculation and interpretation of the earn-out, and gives a sense that the earn-out is real; hopefully providing continued motivation to improve operating performance and increase the likelihood of success of the acquisition.

7. Include a written commitment that requires the buyer to allocate resources to support the operating activities needed to achieve the earn-out. A simple way to implement this is to negotiate the post-closing operating budget for the business and include it in the definitive documents.

8. Assure that the financial accounting treatment of the metrics pre and post-closing are consistent in their application for purposes of calculating the earn-out. A technique to eliminate confusion is to include an example earn-out calculation in the definitive documents.

9. Have the earn-out accelerate in the event of a change of control of the buyer.

10. Tie the earn-out to the employment agreements of the key personnel of the seller. If they are terminated without cause, the earn-out accelerates and is due and payable in full.

Keep in mind that whether selling the entire company, raising a tranche of growth capital (in the form of debt or equity), or pursuing a recapitalization. What you are really selling is the future cash flow of the business. While past performance provides credibility to management's claims, future cash flow is the foundation for valuation and usually the primary reason for buying or investing in a company. A successful earn-out will embrace this core concept.

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AM&AA (Alliance of Merger & Acquisition Advisors)

AM&AA Overview presented by Michael Nall, Founder

The AM&AA is the leading association and credentialing body for 900 middle market M&A professionals in 25countries, providing connections, best practices and education. Our leadership and people have unrivalled multidisciplinary expertise in the financial services industry. Formed in 1998 to bring together Investors, Advisors and other Middle market Transaction Professionals, AM&AA's services firms– including some of the most highly recognized leaders in the industry—draw upon their combined transactional expertise to better serve the needs of their middle market clients worldwide.

AM&AA members represent sellers and buyers of businesses ranging from $5 to $500 million in transaction value. Their services are due diligence, accounting financing, business valuation, tax planning legal, strategic, other advisory and transaction support services.

Our primary goals are to help members improve their level of knowledge, give them access to the tools to help them better market and deliver their services, and provide them with a network of knowledgeable professionals with whom they can share information and resources.

Our Alliance offers members a solid platform for professional collaboration. Our professional members work to provide the entire spectrum of consulting and corporate financial advisory services to measure, build, finance, and convert business value into personal wealth.

www.amaaonline.org

Transactional Solutions for Private Equity and Strategic Investors

By Michael J. Schoenbach & Kirk Sanderson

Would you believe that various M&A insurance products have been around in different forms for 15 years to help buyers and sellers achieve cost effective risk transfer? While still a relatively new product offering, coverage is available to insure, enhance or substitute:

- Representations and warranties, escrows and indemnity cap
- Tax issues
- Existing or threatened litigation
- Contingencies and/or environmental issues

What ultimately allows for success in closing a deal is the ability to identify and address risks inherent in a transaction. Due diligence, thoughtful professional advice and planning, and a sound structure can help manage the risks inherent in a business transaction. However, a prudent structure also must take into consideration the financial consequences of such plans going awry. Counterparties are often called upon to provide indemnity against unforeseen issues, but such coverage is not always sufficient. Or, in some cases, that counterparty may be a private equity firm that cannot subject its investors to long-term hanging liabilities after liquidating an investment. In cases like this when the indemnity is too narrow, too short-term, too small or simply cannot be provided at all, the prudent dealmaker will look to transactional insurance products, such as representations and warranties insurance, tax insurance, litigation buyout insurance, and environmental insurance, to fill in the gaps.

Product	Description | General Price Range	Impact on Negotiations & General Pricing
Representations & Warranties (R&W)	Buyer policy protects the buyer against loss from unknown breaches of R&W including F/S, which are discovered post-close (or post-signing if structured accordingly). Can extend scope / duration of seller indemnity. Seller policies provide backstop to seller indemnification. Price Range: 3% +/-	- Increase speed of deal - Favorably impact auctions - Minimize escrow / indemnity caps - Extend survival of seller indemnity - Facilitate clean exit / earlier distribution - Provide credit worthy protection
Tax Indemnity	Alternative to PLR; protects insured from adverse ruling by IRS or relevant taxing authority regarding intended tax treatment of a given transaction or issue. Covers tax, interest, penalties, contest costs & gross up. Price Range: 3% - 6%	- Improve execution by bridging the discount a buyer may put on an issue versus a seller - Can cover 338 (h) (10) elections, NOLs, 355(e), transfer pricing, sale of REIT shares, real estate issues, cross border issues, etc. - No tax opinion needed, though helpful to have
Litigation / Contingent Liability / Fraudulent Conveyance	Provides certainty via a "box" or "ring fence" around existing litigation to protect insured against catastrophic loss that exceeds the expected loss amount. Price Range: Varies by subject (Litigation 7-10%)	- Improve execution by bridging the discount a buyer may put on an issue versus a seller - Can function as "signaling capital" - Critical issue is the attachment point
Environmental Liability	Can provide "stop loss" protection by capping expected or unexpected costs of clean-up and/or transferring legal liability and title of real estate through asset divestiture program. Enhances R&W coverage regarding scheduled, non-actionable disclosures. Price Range: Varies by structure (can be value +$)	- Improve execution by bridging the valuation a buyer may put on an issue versus a seller - Enhance seller by eliminating "bad" assets pre-transaction to cleanup "good" asset sale - Enhance buyer leverage by taking on "bad" assets at a discount greater than intrinsic liability

Aon's Transaction Solutions (ATS) team is dedicated to providing solutions for transactional risks in mergers and acquisitions, real estate and financing transactions. We service a wide range of private equity and corporate clients as well as their principal legal, accounting and financial advisors. Our financial solutions professionals have all joined Aon after gaining significant transactional experience in one or a multitude of disciplines including accounting, legal, financial services and underwriting careers.

Michael J. Schoenbach, CPA, is managing director and practice leader for Aon Transaction Solutions based in New York City. He has 33 years of accounting, finance and insurance experience. Prior to joining Aon, he consulted to a major underwriter and helped them retool their underwriting guidelines. He has successfully managed an underwriting facility for Lloyd's and has been with Aon for 21 years, where he has developed Transaction Liability products and leads a team working with clients to provide ongoing transaction solutions. He is supported by a team of lawyers and insurance professionals in NY, Philadelphia, Denver, London, Bermuda, Sydney, Tokyo & Singapore.

1. How can M&A insurance be used strategically to improve a bid, allow sellers to achieve a cleaner exit, or simply remove a roadblock?

Schoenbach: Shifting risk to the insurance markets creates opportunity to alter leverage in a negotiation and could ultimately close a deal that would otherwise have little possibility of success. Insurance policies can be structured to quickly & inexpensively provide the seller with the ability to substitute insurance for most or all of an escrow or indemnity cap, thus fostering a clean(er) exit. At the same time, this can allow a buyer to advance their bid in an auction by using this insurance solution to provide the security that would otherwise be available through traditional reps and warranties.

Case Study: Seller Uses "Stapled Insurance Package" – No Indemnity

Situation

- A US private equity firm was preparing to sell a $400M manufacturing company through an auction process
- The target was the last of 15 divestitures of a holding company which also was the last investment of a fund
- The target/holding company had numerous hanging indemnities from past sales, plus tax (NOLs) and environmental issues
- Seller desired to effect the sale on an "as is" basis and have no surviving indemnities post-closing

Solution

- Before the auction began, Aon structured and obtained quotes for a package of reps and warranties, tax and environmental insurance in favor of Buyer. Bidders were told to work with Aon and Seller made it known that it would provide no indemnities
- The R&W Policy covered hanging liabilities from prior transactions and reps related to the current transaction
- The SPA had no survival and provided a credit to purchase price for the insurance cost (less than 1% of transaction value)
- Seller achieved more bids and a better sale price than anticipated; the added benefit was that insurers vetting of these risks made the buyer's on due diligence process simpler and much smoother

2. Very briefly, can you provide insight into the details of these policies, such as who is typically covered under an M&A policy; the duration of the policy; the standard pricing; and how long it takes to place these policies?

Schoenbach: Coverage is designed to replicate or enhance the general term of an indemnity. R&W policies can match or exceed the survival period in a given transaction whereas tax and contingent liability policies will generally track the relevant statute of limitations. Pricing is generally expressed as a percentage of the policy limit desired, is paid as a one-time premium at the close of a transaction, and will vary based upon product, risk profile and geography – insurance is generally more expensive for US risks than European risks. R&W policies are designed to cover unknown breaches while tax and litigation policies generally cover known events.

3. Could you outline the growth of M&A insurance, or 'transaction liability' (TL) products, over recent years?

Schoenbach: The use of TL or M&A insurance has expanded exponentially over the past 10 years. We estimate that the global market will place nearly $15bn of policy limits for 2013 based upon historical placement rates. Product acceptance has grown, consistent with the desire to minimise risk and quality of coverage provided; the knowledge that the products exist and have performed as advertised; the decrease in cost combined with the increase in the speed of execution; and the reliability and ease of the underwriting process.

Transaction Liability by the numbers:

- $10 billion in policy limits sold in 2012 (anticipated to grow by 50% in 2013)
- "Take up" and acceptance rate has increased exponentially over past 10 years
- Pricing is down nearly 50% from 10 years ago
- Process and timing over past 10 years has moved from 3 weeks to 7-10 days

4. Can you describe the arbitrage that exists in the pricing of these products and how it could positively impact the economics of a transaction?

Assuming a purchase price of $1B (50/50 debt-to-equity) with $150M of deal "protection" available in the form of escrow, indemnity and R&W insurance. By reducing the amount expected from the seller in the form of escrow and indemnity and replacing it with insurance capital, we can reduce the net price the seller is willing to accept. The seller "wins" by avoiding escrow/indemnity and the buyer wins by achieving a lower purchase price. The example below is directionally correct based on our experience using R&W in lieu of escrow/indemnity caps. In theory, there is a multiple returned for every dollar spent on insurance, in terms of purchase price reduction.

Row #	Calculation	($ in million)	Base Case No Insurance	R&W Match Protection	R&W Increase Protection
1	Assumed	Total Purchase Price (excl cost of insurance)	$ 1,000	$ 950	$ 950
2	7*10	Cost of Insurance	$ -	$ 6	$ 7
3	1+2	Total Purchase Price (incl cost of insurance)	$ 1,000	$ 956	$ 957
4	Base case price-3	Potential Value Arbitrage vs. "No Insurance Base Case"	$ -	$ 44	$ 43
5	Assumed	Escrow (duration 2 years)	$ 70	$ 10	$ 10
6	Assumed	Indemnity Cap (duration 2 years)	$ 80	$ -	$ -
7	Assumed	R&W Insurance - Limit (duration up to 6 years)	$ -	$ 140	$ 180
8	5+6+7	Total Deal "Protection"	$ 150	$ 150	$ 190
9	8/3	Deal "Protection" as % of Purchase Price	15%	16%	20%
10	Assumed	Insurance Cost -% of Limit Purchased	0.00%	3.95%	3.75%
11	2/3	Insurance Cost -% of Total Purchase Value (bps)	-	58bps	71bps
		Assumptions			
		Price ($ millions)	$ 1,000	$ 1,000	$ 1,000
		Assumed purchase price reduction due to better deal structure	0%	5%	5%
		Escrow % (as a % of purchase price)	7%	1%	1%
		Indeminty Cap (as a % of purchase price)	8%	0%	0%
		R&W Limits (as a % of base case purchase price)	0%	14%	18%
		R&W Pricing (as a % of insurance purchased)	0%	3.95%	3.75%

5. How do I know when an opportunity exists?

If you can answer yes to any of the chart below you should contact Aon to see if there is a possible solution we can create for your transaction. Note: Aon does not charge its clients for the efforts we take to determine if an opportunity exists.

Filters as to whether Transaction Liability Solutions Can Help: If you answer "yes" to any of the below questions, contact our TL team				
#		Buy Side Yes/No	Sell Side Yes/No	Rationale
	R&W			
1	Will previous owners stay on as management?		NA	If a breach of reps occurs, the PE firm does not have to sue management
2	Is the deal an auction?		NA	R&W insurance can differentiate a bid and more quickly shut the process down
3	Is there an escrow and/or an indemnity cap over $5 million?			The cost of R&W is such that using this to reduce escrow, is almost always value accretive
4	Is the seller a PE firm and is this one of the last remaining assets of fund?	NA		Seller will not want to tie up cash versus returning it to its investors
5	Will reps and warranties not survive closing? (e.g., public to private; bankruptcy)?			Provide reps where none exist
6	Is the Indemnifying party a collection risk? (e.g., a trust, a foreign entity)			Provides more certainty around collection (If a breach of reps occurs, the PE firm does not have to sue management)
	Tax			
7	Is there a tax issue the buyer is unwilling to take on without seller indemnification?			Insurance allows for a more efficient indemnification structure
8	Are NOL's a major source of value?			Can insure the realizability of NOL
9	Was there an attempt to obtain a private letter ruling?			Tax treatment can be insured, even in the absence of a private letter ruling
	Litigation			
10	Is there outstanding litigation, that could be material, but has an uncertain outcome?			Provide certainty to a given transaction. If the cost of insurance falls into the range of outcomes, arbitrage is possible.
	Successor Liabilities			
11	Are there known issues that could result in future claims, but where no claims have been brought yet (product liability)?			Provide certainty to a given transaction
	Environmental			
12	Are there material environmental liability with significant uncertainty as to valuation			If any of these issues are material from a price adjustment perspective or keeping the deal from consummating, engage with the TL team
	Benefit and Comp			
13	Are there any material deal issues stemming from 409a issues?			If any of these issues are material from a price adjustment perspective or keeping the deal from consummating, engage with the TL team
14	Are there any material deal issues stemming from Golden Parachute issues?			
15	Are there any other health and benefits issues requiring significant additions to the contract indemnification/escrows?			

Aon plc is the leading global provider of risk management, insurance and reinsurance brokerage, and human capital solutions and outsourcing services.

Aon Advantage

Our key advantage is our broad view of two of the most important issues in our economy today: risk and people. With an employee base of 65,000 people working in more than 120 countries, we can anticipate how changes in one sector impact another.

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Snapshot: Deal Focus

North America

American Airlines and US Airways merge in an $11 billion deal

Buyer: American Airlines
Seller: US Airways
Value: $4.9 Billion

American Airlines and US Airways have merged in an $11 billion deal – creating the largest airline in the world. The announcement, made in February 2013, marks the seventh merger since 2005 in an industry that faces rising gas prices and stiffer competition.

The new airline will take the American Airlines name and branding, helping to buoy a company that has been in bankruptcy for more than a year, struggling to compete as its rivals have grown. Under the terms of the all-stock deal, American Airline's creditors will own 72% of the combined airline, while US Airways shareholders hold the remaining 18%. US Airways CEO Doug Parker will serve as the combined company's CEO while AMR CEO Tom Horton will become the non-executive board chairman.

South America

3G Capital Complete Acquisition of H.J. Heinz Company

Buyer: 3G Capital
Seller: Heinz
Value: $28 Billion

Brazil based 3G Capital, together with Berkshire Hatahway, have completed the joint 50-50 ownership of H.J. Heinz – one of the most recognisable food companies in the world for $28 billion. The transaction, completed in June 2013, heralds what is expected to be a year in which M&A activity in Latin America will break its existing record.

3G, an investment firm run by Brazilian billionaires, has a reputation for strategical overhaul at companies with aggressive cost-cutting prompting speculation that H.J. Heinz Co. could be in store for a major shake up similar to 3G's work with Burger King. Burger King CEO Bernardo Hees, who remains a partner at 3G, has become the seventh Chief Executive Officer of Heinz in the Company's renowned 144 year history.

The New South African Merger Procedure[1]

By David Yuill

The South African M&A regulatory framework has undergone a significant change in recent times with the introduction of a new Companies Act on 1 May 2011. This is the first significant change to South African company law in the last three decades, with the previous Companies Act having been in place since 1973. The new Companies Act has introduced a number of new concepts into South African law, including, for the first time, a statutory merger procedure and shareholder appraisal rights. In this article, we focus on the statutory merger procedure and assess how it is has fared in practice in the two years since the Companies Act came into effect.

South Africa has traditionally not provided for mergers or amalgamations in the true sense of the word, where one entity merges into another or two or more entities amalgamate into a new separate entity. Business combinations have generally been effected through the acquisition by one company of the shares or assets of another, through a scheme of arrangement, tender offer or sale of business. The adoption of a statutory merger procedure in the new Act therefore marks a significant departure from the old regime. It also brings South Africa into line with a number of major jurisdictions worldwide.

The merger procedure provided for in the Act is, on the face of it, both relatively straightforward and flexible, which is in keeping with the new Act's intention of facilitating business combinations. Before considering how this has translated in practice, however, it is perhaps useful to set out a brief outline of the procedure itself.

A key element of the new merger procedure is the merger agreement. In terms of the Act, two or more companies which wish to merge are required to enter into a written agreement setting out the terms of and means of effecting the merger. The Act prescribes certain matters which are required to be included in the merger agreement, but otherwise places few limitations on the substance of the agreement, and companies ultimately have considerable latitude to structure the merger transaction in a manner that best meets their requirements. In particular, the Act allows considerable flexibility as to the consideration that may be paid. It contemplates not only a "traditional" merger transaction, where shares in the merging companies are converted into shares in the merged entity, but also allows for other forms of consideration to be paid to the shareholders of the merging companies. This would include the possibility of shareholders of one or more of the merging entities being paid in cash (which creates the possibility of a merger being used as a squeeze-out mechanism) or receiving shares in an entity other than the merged entity (such as, for example, the holding company of the merged entity) as consideration. This would facilitate transactions structured in different ways to meet the parties' specific objectives. The flexibility to accommodate the parties' desires is potentially one of the most significant advantages of the new merger mechanism for executing M&A transactions.

Once the merger agreement is concluded, the merger must then be submitted to shareholders of each of the merging entities for approval (provided that the board must first be satisfied that each of the surviving merged entities will be able to satisfy the prescribed solvency and liquidity test). Approval of 75% of the voting rights exercised in respect of the resolution by disinterested shareholders (i.e. excluding shares held by the acquirer and its concert parties) is required. Furthermore, if shareholders holding 15% or more of the voting rights vote against the proposed merger, any dissenting shareholder may require the company to first seek court approval for the transaction before implementing. Even if the 15% threshold is not reached, any shareholder who has voted against the resolution may apply directly to the court for a review of the transaction. However, the bar for successful review is set high - the court may only set aside the resolution if it determines that the resolution is "manifestly unfair to any class of holders of the company's securities" or if it determines that there was a significant and material procedural irregularity. Outside of these specific shareholder protections, a merger can also trigger appraisal rights for disgruntled shareholders, in terms of which they can, subject to certain requirements, require the company to buy their shares at fair value.

Once the requisite shareholder approval (and, if required, court approval) is obtained, the final step the parties are required to follow before implementation is to notify every known creditor of each of the merging companies of the merger. Any creditor which believes that it will be materially prejudiced by the merger is entitled to apply to court within 15 business days of being notified for a review of the transaction.

If no creditors object to the transaction, the parties may then proceed with the implementation of the merger. A notice of merger must be filed with the Companies Commission, and upon receipt of such notice the Commission will issue a registration certificate for each new company, and deregister each of the merging companies which is not intended to survive the transaction. The merger then takes place in accordance with the terms and conditions of the merger agreement. One of the key potential benefits of the new merger procedure is that in terms of the Act, all of the assets and liabilities of the merging companies are transferred, by operation of law, to the merged company or companies. This means that companies can avoid the costs and legal formalities normally required for the transfer of a business from one entity to another, as well as the length of time it takes to transfer things such as immovable and intellectual property.

It is perhaps useful at this stage to briefly consider how the merger procedure compares to the other M&A mechanisms available in the South African context. Firstly, the sale of business - in terms of the Act, any disposal by a company of all or the greater part of its business requires a special resolution of shareholders. The shareholder approval requirements are the same as those for a merger, as is the court review process and appraisal rights procedure. Creditors would also need to be given constructive notice of the transaction in accordance with s 34 of the Insolvency Act. A sale of business is generally not a favoured method of implementing an M&A transaction involving the acquisition of an entire company or business, primarily because of the costs, legal formalities and time that is normally involved for transferring of a business from one entity to another. The merger procedure thus has, in theory, a significant advantage over a more conventional sale of business in that it provides for the automatic transfer of the property and obligations of the merging entities, as well the dissolution by operation of law of the non-surviving entities without needing to go through formal liquidation proceedings. The sale of business may nevertheless be useful in those scenarios where an acquirer may want to cherry-pick certain assets and/or obligations of the target, as opposed to acquiring them all (as would happen in a merger). A sale of business also only requires the approval of the shareholders of the disposing company, as opposed to a merger where the approval of all merging entities' shareholders are required.

A scheme of arrangement procedure is a flexible procedure involving an arrangement between a company and the holders of any class of its securities which may be used for a variety of different procedures, including, inter alia, a reorganisation of the share capital or a takeover. It has been the preferred method of implementing a friendly takeover in the South African context – typically the scheme of arrangement will be entered into between the acquirer, the target and the target shareholders, whereby the acquirer will acquire all or a substantial portion of the target's shares.

In the past, one of the drawbacks of the procedure, was the requirement for judicial sanction of the scheme, which made it both costly and time-consuming. Under the new Act, however, the sanction of the courts is no longer required, except in the same limited circumstances as with a merger - instead, the company is required to provide an independent expert report on the transaction to its shareholders, who must then approve the scheme by special resolution in the same manner as for a merger.

Turning finally to the tender offer, the tender offer procedure provided for in the Act is substantially the same as the previous Act. Thus, inter alia, acquirers are required to make a mandatory offer for all the shares of the target once they have acquired a specified percentage of the target's shares, an acquirer can squeeze out the minority if 90% or more of the shareholders not related to the acquirer accept its offer and the directors are not entitled, as in the UK, to take any actions that may frustrate the bid. The tender offer as a takeover procedure has certain benefits – it does not require the approval of the acquirer's shareholders (which would be required for a merger, although not for a scheme), nor does it give rise to any appraisal rights on the part of the acquirer or target's shareholders. It is typically the acquiring company's method of choice in the context of hostile takeovers (which are becoming more prevalent in the South African context), given that the co-operation of the target's board is not required in the way that it is for a merger or a scheme. However, shareholders can bring enormous pressure to bear on a target company board of directors to negotiate a sale by scheme or merger by the acquirer making a public "bear-hug" approach stating their willingness to pay a premium price. The downside of a tender offer, at least for the acquirer who is looking to squeeze out the minority, is that a much higher threshold of shareholder acceptances (90%) is required for a squeeze-out than under a scheme or merger (75%).

On the face of it, the merger procedure would seem to offer certain significant advantages as a means of implementing transactions. It is a potentially very versatile and flexible procedure, which seems to offer a greater range of possible transactions than the other mechanisms discussed above. It also, by providing for the transfer of assets and liabilities by means of operation of law, can potentially make the administration involved in acquiring a business significantly simpler than the more laborious process involved in a straightforward sale of business.

However, to date there has, to our knowledge, been very little use of the merger procedure in the South African market, particularly in the public space. There are, in our view, a number of possible reasons for this. Firstly, this may be partially due to South African practitioners' lack of familiarity with the procedure and the various possibilities that it offers. In the context of a friendly transaction, the preference still seems to be use the more familiar scheme of arrangement procedure, particularly given that its primary drawback under the old Act (the extensive involvement of the courts) is no longer required. Indeed, although it has the additional requirement of an independent expert report, the formalities required appear to be, generally speaking, less than those required for a merger procedure (given that no creditor notification is necessary, and only the approval of the target shareholders is required). Secondly, one of the key benefits of the merger procedure – that it simplifies the transfer of assets and liabilities – hasn't, in our experience, always proved to be the case in practice. This is partially because other areas of law are yet to catch up – thus, for example, intellectual property legislation has not yet been amended to provide for automatic transfer of intellectual property rights upon a merger, and the usual transfer processes have to be followed. Furthermore, due to uncertainty about the legal consequences of the procedure, what we have seen in practice is that a conservative approach is often followed (i.e. out of an abundance of caution, consents are still sought from counterparties for transfer of material contracts). Thirdly, the tax legislation has not yet been amended to specifically cater for mergers, and there is some uncertainty as to the tax consequences of a merger.

We would hope that certain of these issues (such as the tax uncertainty, and the fact that no provision has yet been made for automatic transfer of things such as immovable and intellectual property on a merger) will be addressed in the near future through appropriate legislative changes. If this is done, we would expect that the flexibility and versatility of the merger procedure should make it a potentially attractive option for South African deal-makers going forward, particularly once they become better acquainted with its possibilities.

David is a partner in Bowman Gilfillan's Corporate Department. David specialises in mergers and acquisitions, capital markets and general corporate and commercial law, as well as the provision of regulatory advice in the field of black economic empowerment. In the capital markets area, David was the execution partner of the team that advised Royal Bafokeng Platinum Limited in relation to a combined offering of its shares (involving a primary issue by the company, and a secondary issue by its shareholders) and its listing on the JSE, which took place at the beginning of November 2010. He was also part of the team that acted as South African counsel to Morgan Stanley in the secondary offering by Anglo American of some of its shareholding in Exxaro at the time of its IPO, and more recently, was part of the team advising Bharti in the proposed listing of its GDRs on the JSE as part of the greater proposed merger transaction with MTN.

Recent M&A transactions that David has advised on include black economic empowerment transactions entered into by Merrill Lynch and Cisco Systems, Inc. involving the disposal of equity stakes in the listed parent companies to South African empowerment shareholders and the disposal by Boart Longyear of its mining capital equipment business to a private equity buyer. David was also part of the team advising the Tongaat-Hulett Group in relation to a transaction involving, inter alia, the unbundling of Tongaat Hulett Group's shareholding in Hulamin and the introduction of BEE partners into both Tongaat Hulett and Hulamin.

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1 - Please note that in writing this article we have drawn on a previous article written by ourselves and Trevor Norwitz – "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" in Modern Company Law for a Competitive South African Economy, Tshepo Mongalo (ed.), Acta Juridica, 2010, Juta.

Snapshot: Deal Focus

Africa

Danone Increases Dairy Stake in North Africa

Buyer: Danone
Seller: Centrale Laitiere
Value: €543 Million

Danone has increased its stake in Moroccan dairy processor Centrale Laitiere to 67% - a deal that has been pinpointed as huge move for the company based in North Africa. The French dairy giant has finalised its purchase for €543 million. Having increased its share from 29.2% to above the 40% threshold.

Danone has held a 29.2% shareholding in Centrale Laitere – Morocco's leading dairy product company – since 2001. The Danone brand is already well known in Morocco through products such as Yawmy, Moufid and Activia, which are all sold by Centrale Laitere. Created in 1959, Centrale Laitiere SA is a Morocco-based company engaged in the production and distribution of milk and dairy products. The Company's product range includes milk, yoghurts, cream desserts, fresh cheeses and other dairy products. Centrale Laitiere SA operates through several subsidiaries, including Lait Plus, Agrigne and Fromagerie Doukkalas.

Africa

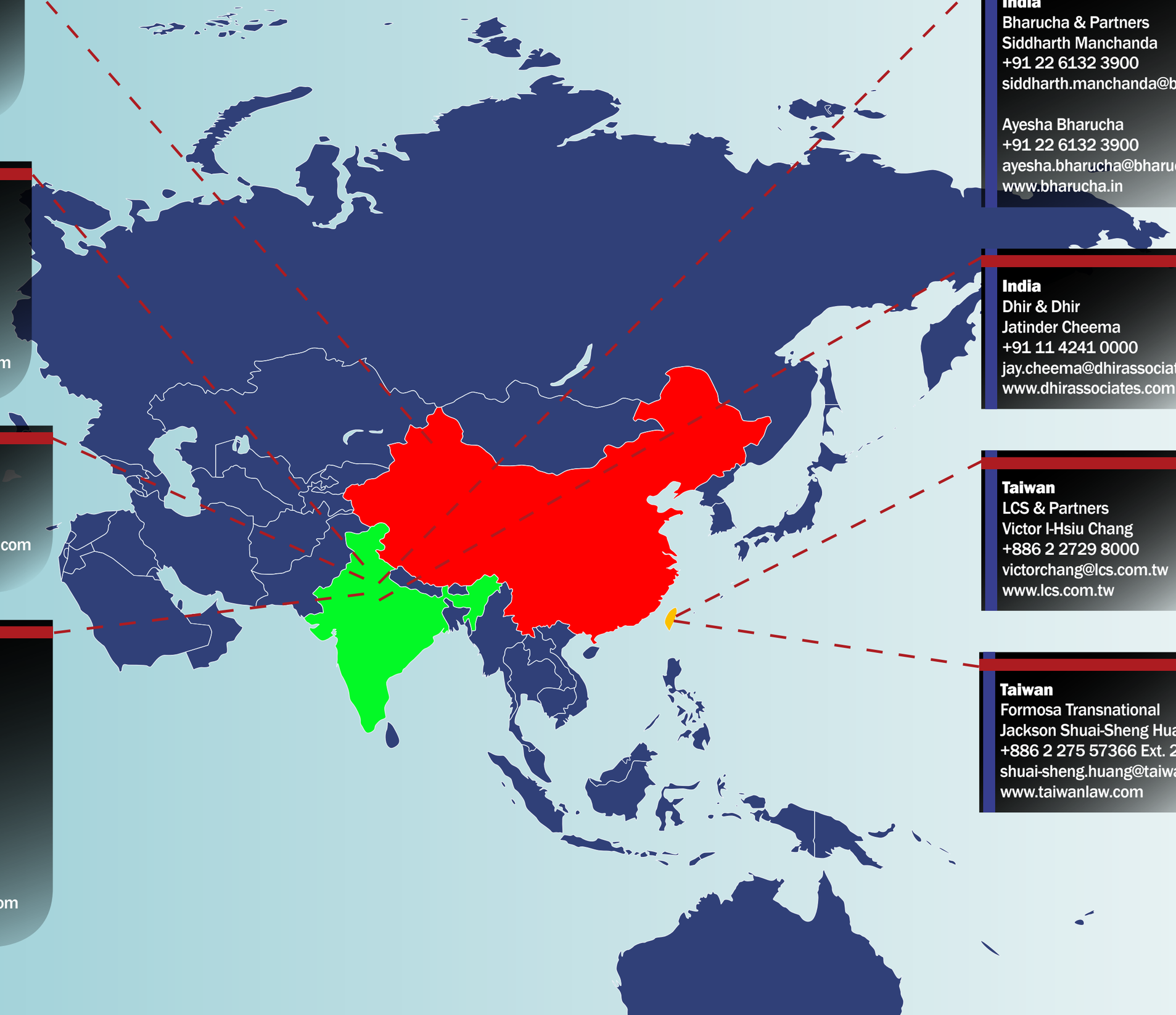
MTN Group Plots an $8 Billion Foreign Investment

While this deal has not been concluded, we felt it was necessary to include the exciting announcement MTN Group recently made at the Reuters Africa Investment Summit. MTN Group indicated that it is willing to spend ZAR71.12 billion (USD7.97 billion) on an acquisition and is looking for targets on the African continent, in the Middle East and in Southeast Asia.

MTN Group is a South Africa-based multinational mobile telecommunications company, operating in many African, European and Middle Eastern countries. With a war-chest of almost USD8 billion at its disposal, MTN will arguably be able to have its pick of telecoms operators in its desired markets.

The company currently has a market capitalisation of US$34 billion. However, MTN is facing a multi-billion lawsuit over how it acquired its operating license in Iran, and may have to sell up if US sanctions are intensified.

Asia



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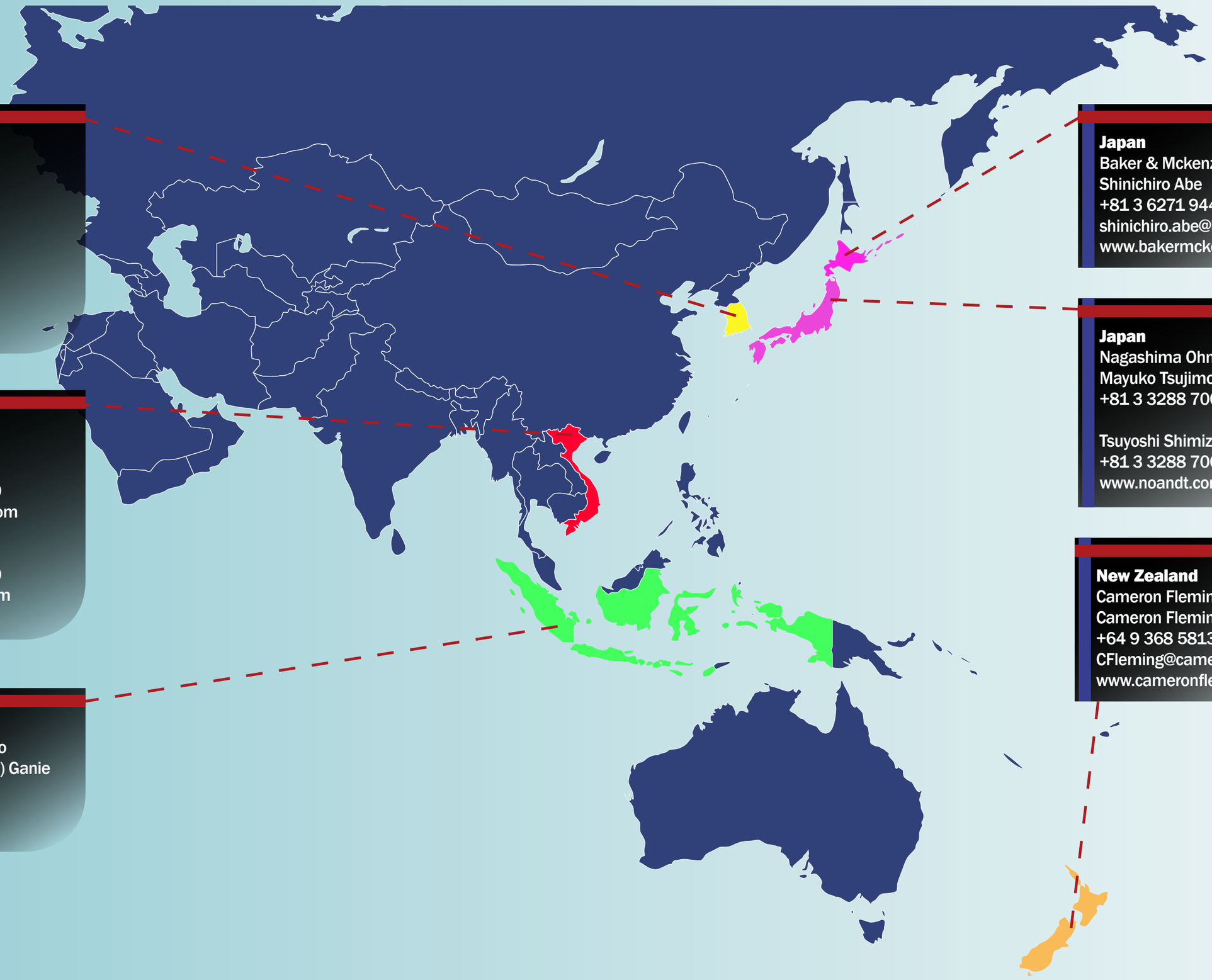
Asia Continued



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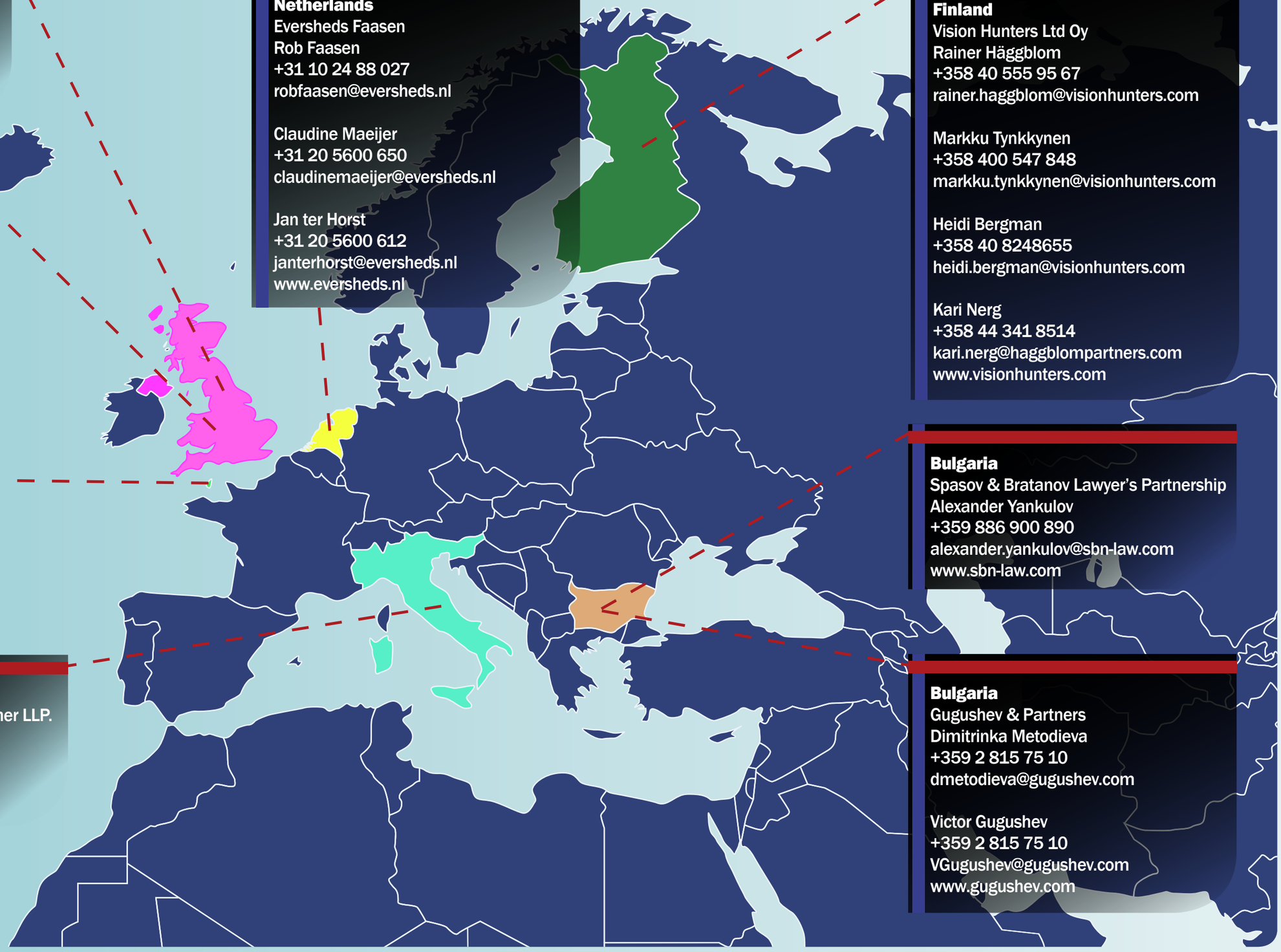

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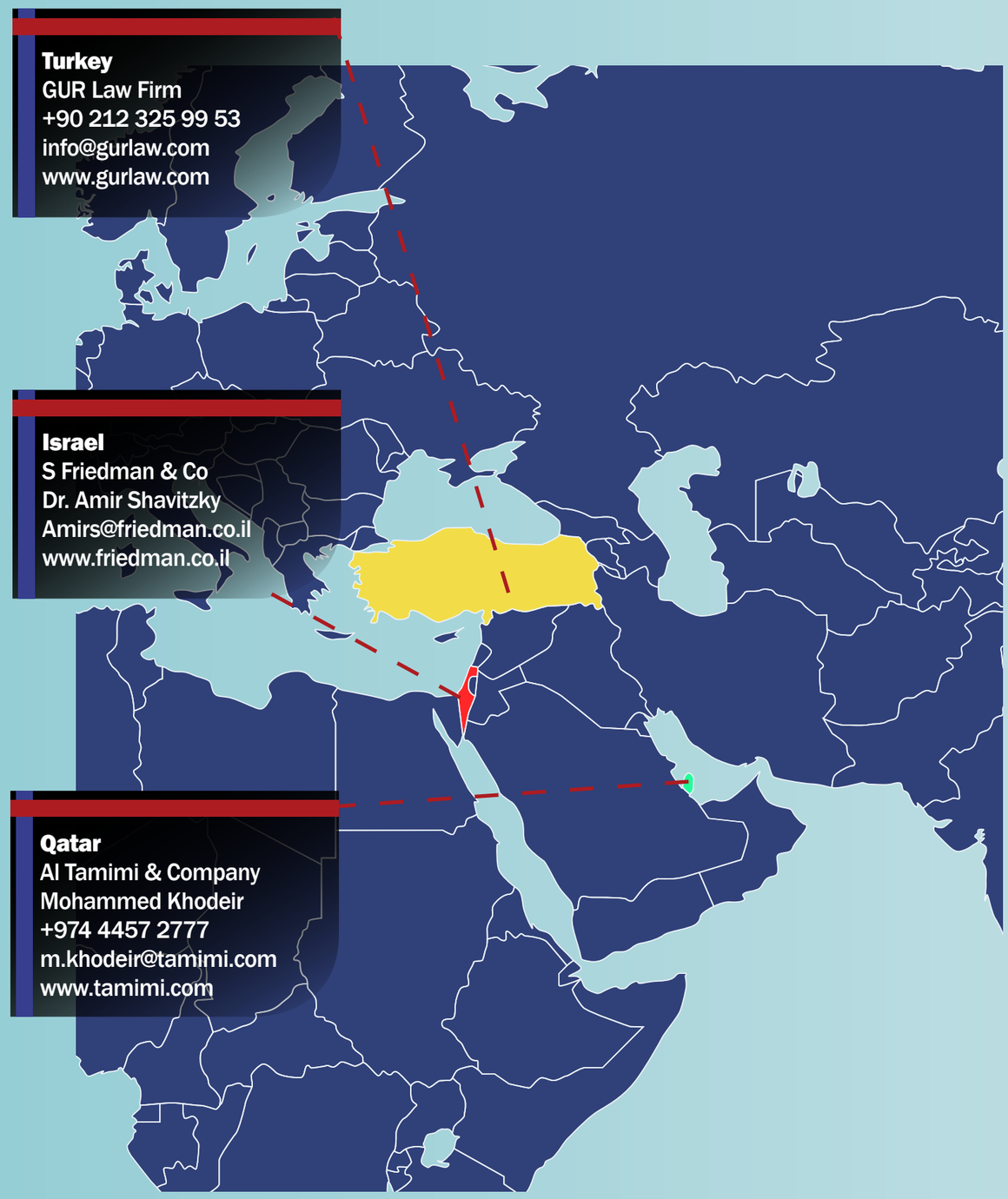
Middle East



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