International M&A and Joint Ventures Committee Newsletter

October 7, 2011

Forward From the Committee Co-Chairs:

As Co-Chairs of the International M&A and Joint Venture Committee, and on behalf of our Committee's entire leadership team, we commend for your reading this second edition of the Committee newsletter for the 2011. We hope that you will become a regular reader and will find the content of the Committee's newsletters to be practical and useful in your practice.

To our Committee members, we also want to welcome you to what we feel will be an exciting 2011-2012 for our group, in terms of scholarship, meeting programming and networking opportunities. We encourage you to seek out ways to become active with the Committee, starting with our Committee conference calls on the first Tuesday of each month.

We are looking forward to this year's Fall Meeting in Dublin, starting on Tuesday, October 11. We are particularly excited about the numerous fine programs in store which have been prepared by Committee members, and we urge your attendance and participation at our Committee sponsored sessions. The programs are looking to be most informative, covering a wide array of current issues of note for cross-border transactional lawyers.

Finally, we want to pay special thanks to Committee members who have been hard at work on the newsletter, now under Gordon Cameron's stewardship following a great run for the last several years led by Kees Koetsier. We know Gordon will welcome your participation in upcoming publications.

Best regards, and see you in Dublin!
Mattia Colonnelli de Gasperis, Co-Chair
Randall A. Hanson, Co-Chair

Editor's Note:

It is a real pleasure to take over the role of editor of our Committee's newsletter. Because of the work of Kees and the contributions of many Committee members, we have taken a small four page newsletter that covered two countries in its first edition in 2006, to a regular newsletter that frequently covers more than ten jurisdictions per edition. Our newsletter has become a valuable tool for keeping Committee members informed of M&A developments in our respective countries.

We have a number of very interesting articles in this edition, spanning twelve countries on four continents (come on South America and Africa, we need some contributions from you next time!). Of particular note, Adrian Benson has provided an update on the M&A market and some recent legal developments in Ireland, just in time for our Dublin meeting, and Frances Murphy has provided a summary of some of the key recent changes to the UK's Takeover Code.

As always, many thanks to the Committee members that contributed to this newsletter. Our next edition is planned for late 2011 or early 2012 – please keep a look out for a call for submissions in late November or December.

Kind regards,
Gordon Cameron

IN THIS ISSUE

Country Updates

COUNTRY UPDATE ON AUSTRALIA

Shareholder Lock Ups in Schemes of Arrangement

By James Rozsa, Corrs Chambers Westgarth, Australia (james.rozsa@corrs.com.au)
and Jaclyn Riley-Smith, Corrs Chambers Westgarth, Australia (jaclyn.riley-smith@corrs.com.au)

In Australia, schemes of arrangement are the closest deal structure to a US-style merger. However, there has traditionally been a perceived risk that US-style voting agreements could create a separate class of shareholders that need to vote, and consequently have not provided the same deal protection in Australian transactions. However, a decision earlier this year may give bidders greater confidence in using voting agreements going forward.

Schemes of arrangement

In a scheme of arrangement, target shareholders are divided into classes (focusing on a commonality of legal rights of members) for the purposes of voting. In order for a scheme to be binding on a class of members it must be approved by:

- 75% of votes cast by members in that class, present and voting at the meeting (in person or proxy); and
- 50% in number in that class, present and voting at the meeting (in person or proxy).

If there are separate classes of shareholders, the whole transaction is often interconditional on approval by each class. For this reason, it is desirable that small numbers of members not be placed in a separate class as this effectively would give them a veto right over the whole transaction.

Lock-up devices

Bidders have not been willing to enter into voting agreements (under which a shareholder agrees with the bidder to vote in favour of the scheme) due to a concern that these types of arrangements with major shareholders may result in those shareholders constituting a separate class for voting purposes. Instead, call options between bidders and major shareholders of the target have been a common form of deal protection in Australian schemes of arrangement for a number of years. Call options are typically structured so that a bidder has the right to acquire the shares during a specified period if a competing proposal emerges. The exercise price is generally equivalent to the consideration under the scheme and the grantor of the option is restricted from disposing if the shares before the scheme. A series of cases have held that properly structured call options will not be class creating.

However, in Straits Resources Limited [2010] FCA 14661, a major shareholder agreed with the bidder that it would not dispose of its shares, would vote in favour of the scheme and would not support any competing proposal. The court held that this agreement did not result in the shareholder being placed in a separate class. Relevantly, the court did require the votes of the shareholder to be separately tagged and counted so the court could consider those votes at the final court hearing. In this case, the scheme was approved by an overwhelming majority, and so even if the votes the subject of the voting agreement had been disregarded, the scheme would have been approved by the requisite majority. Unfortunately, the court did not discuss whether it would have decided differently had the voting agreement been the difference between the scheme being approved or failing.

Voting agreements have now been used in several schemes without giving rise to class issues, and in each case the votes subject to the voting agreement have been tagged.

Way forward

Although prospective bidders may take confidence from the growing body of precedent for voting agreements, the class issue is not free from doubt. Bidders are safest with a voting agreement when they don't really need it (i.e. when a scheme is passed by an overwhelming majority so the court does not need to consider the tagged votes). When a bidder actually needs to rely on a voting agreement (when those votes could make the difference between the scheme being approved or failing) the risk remains that a court may consider whether the shareholder would have voted differently in the absence of the agreement.

Given the class risks of voting agreements it is more common to rely on public statements that the major shareholder intends to vote in favour of a scheme, in the absence of a superior proposal. Often shareholders that enter into call options will make such statements. Under Australia's "truth in takeovers" policy, the shareholder would then be bound to act consistently with such an intention statement, or risk action by the Australian securities regulator. On this basis, a bidder can derive a high level of comfort that the shareholder will support the scheme, even though it will not have a direct contractual basis for enforcement.

COUNTRY UPDATE ON CANADA

The Growth of the Canadian High Yield Debt Market

By Ken Ottenbreit, Stikeman Elliott LLP, New York (kottenbreit@stikeman.com)
and Marc-André Wolfe, Stikeman Elliott LLP, New York (mawolfe@stikeman.com)

The emergence of a high-yield debt market in Canada is a positive development for Canadian M&A and for Canadian capital markets more generally. Commencing in 2009, a Canadian market in high yield debt started to develop, as issuers, including TSX listed issuers, accessed the high yield market in Canada to raise the funds for acquisitions, among other things.

Also known as "non-investment grade debt", "speculative grade debt" or "junk bonds", high yield bonds are debt securities that do not qualify as investment grade. In other words, they have an elevated probability of default or loss upon a credit event (e.g. bankruptcy) relative to blue chip issuers or government debt. Issuers that do not qualify for investment grade ratings from major credit rating agencies must pay a higher interest rate and typically build in investor-friendly structural features to attract investors to these relatively high-risk investments.

This recent activity is a stark contrast with years past, when Canadian companies issuing high yield debt have historically had little choice but to tap the high yield market in the United States. In recent years, however, an increasing number of Canadian companies have been opting to issue Canadian-dollar denominated high yield bonds to investors in Canada. 2010 saw 14 Canadian deals worth more than $3.4 billion, up from $1.2 billion in 2009. Investors' appetite for Canadian-dollar denominated high yield debt is strong and growing, as evidenced not only by the foregoing statistics but by the frequency of over-subscribed deals and the emergence of an increasing number of high yield mutual funds and exchange traded funds that bundle high yield debt for the Canadian retail market.

In 2010, companies such as dual TSX and NYSE-listed North American Energy Partners, Videotron and TSX-listed Corus Entertainment issued Canadian dollar-denominated, non-investment grade debt.

As in international markets, Canadian high yield debt covenants – generally incurrence-based and containing call protections but absent financial maintenance covenants – are looser than bank loan covenants but tighter than those governing investment grade debt. This structure provides companies with the flexibility required to operate their businesses and support growth, while protecting investors from the higher risk associated with speculative debt.

In the Canadian M&A market, certain transactions, such as the acquisition by RTL-Robinson Enterprises Ltd. of Westcan Bulk Transport Ltd., have already successfully used a high-yield debt issue as a financing mechanism.

While Canadian high-yield offerings in 2011 are outpacing 2010, the U.S. and international high yield markets have started to tighten once again, thus making the (relatively more active) Canadian high yield market potentially more attractive. Thus, issuers both foreign and domestic have continued to look at the Canadian high yield market, notwithstanding its smaller size, as a potentially untapped marketplace for high yield offerings both inside and outside of the M&A context.

COUNTRY UPDATE ON INDIA

Options: No Longer Viable for Foreign Investors

By H. Jayesh, Juris Corp., Mumbai, India (h_jayesh@jclex.com)
and Nitu Agarwal, Juris Corp., Mumbai, India (n.agarwal@jclex.com)

Foreign strategic investors intending to invest in Indian companies through foreign direct investment (“**FDI**”) route will have to now deal with one additional hurdle. This is as a result of the consolidated Foreign Direct Investment Circular (“**Amended FDI Circular**”) issued by Government of India (“**GOI**”) on September 30, 2011. The Amended FDI Circular stipulates that FDI with in-built options, etc., would be treated as a foreign currency borrowing and not FDI.

The Amended FDI Circular sets out that only equity shares and fully, compulsorily and mandatorily convertible instruments with no in-built options of any type, would qualify as eligible instruments for FDI. Also, equity instruments supported by options sold by third parties and, for that matter, equity instruments transferred to non-residents having such options, will also lose their equity character. Such equity instruments would be deemed as foreign currency borrowings and accordingly will have to comply with the applicable Indian foreign exchange regulations. These regulations restrict the purposes for which foreign currency loans can be availed by Indian companies, the minimum maturity, aggregate costs of / interest on such borrowings, etc.

Options in securities, especially put options, have been used in the past to grant an option holder a right to obligate the other shareholders, generally the promoter group, to buy the securities (equity shares and/or fully and mandatorily convertible instruments) held by them. Such arrangements have been very effectively used, quite often in joint ventures.

These rights have generally been very popular with strategic investors as they have utilized them to agree upon pre-fixed returns and avail themselves of an assured exit mechanism after a certain number of years. It seems that the GOI has given in to the Reserve Bank of India (the “**RBI**”), the Indian central bank and also the authority regulating dealings in foreign exchange by including conditions subject to which foreign currency loans can be availed.

The RBI has for quite some time been frowning over such arrangements, viewing them as lending and borrowing transactions rather than equity deals. In doing so, the RBI seems to have not factored in that these arrangements are not backed by any collateral and, in case of a breach, the option holders are often left without any meaningful enforcement remedies.

In addition, what should not have been lost sight of is that these arrangements are similar in nature to a transfer of securities which parties are otherwise free to consummate without requiring any approvals unless the sale price is not in accordance with the Pricing Guidelines notified by RBI. Therefore, it is difficult to comprehend the RBI's discomfort over such arrangements.

Such arrangements, including purely domestic arrangements, have been otherwise subject to a considerable amount of debate in the past few years with even the Securities and Exchange Board of India ("**SEBI**") disapproving of such transactions. SEBI is the capital markets regulator. SEBI has taken a particular view of the provisions of the Securities and Contract Regulation Act, 1956 ("**SCRA**") prohibiting all forward contracts, i.e. contracts for sale or purchase of securities, other than on a spot delivery basis. What is often lost sight of is that the SCRA applies only to marketable securities and not to all securities. Also, even with regard to marketable securities, both SEBI and the RBI have been oblivious to a nearly 50 year old notification issued by the GOI under the SCRA which exempts joint ventures and collaborations from the purview of SCRA ("**Old Notification**"). The effect of Old Notification is that any options, etc., created or entered into in the context of joint venture or collaboration agreements are not affected by the SCRA prohibition on forward contracts.

Spot delivery contracts, as the name suggests, are transactions where the transfer of securities and payment of consideration for such securities take place on the same or the next day. In contrast, options, etc., impose obligations on one of the parties to sell their shareholding after expiry of a certain period of time and are hence seen as a forward contract.

Earlier this year in an informal guidance (Indian equivalent of a No Action Letter) issued to Vulcan Engineers Limited, SEBI struck down options in securities holding such clauses to be against the provisions of the SCRA. Strangely, there is no reference to the Old Notification. In another instance, in the guise of giving its clearance to an open offer, SEBI forced the seller (Cairn) and the buyer (Vedanta) to drop provisions in their share purchase agreement which gave the purchaser an option to buy further securities.

The irony is SEBI itself has explicitly reaffirmed its recognition of options as regards exempting certain transfer of shares having to comply with the takeover code. In the new Take-Over Code, 2011, recently notified by SEBI, it has itself validated transfer of shares pursuant to options in certain circumstances.

Nevertheless, given the rigid stand taken by various regulators in India, investment with in-built options looks like a 'no-go' zone for foreign investors in India. The challenge before international investors now is to devise innovative ways to structure their deals within the legal framework as being applied by the various regulators.

COUNTRY UPDATE ON IRELAND

M&A in Ireland – A Snapshot of Market Activity and Recent Legislative Developments

By Adrian Benson, Dillon Eustace, Dublin, Ireland (adrian.benson@dilloneustace.ie)

Market Activity in 2010

A massive fire sale of bank assets led to a surge in Irish M&A activity in the second half of 2010 according to research conducted by Thomson Reuters. According to the research, companies and assets worth almost EUR 20 billion were bought or sold by Irish businesses in 2010 and this represented the highest level of activity in the

Irish market since a record EUR 22 billion of M&A activity was announced in 2007. The data excludes all but the largest real estate deals. According to Thomson Reuters, Irish M&A activity peaked in 2007 with 420 deals worth EUR 22 billion. Activity halved the following year and was down to EUR 7 billion by 2009.

The sale by Allied Irish Bank of its Polish unit Bank Zachodni to Santander for EUR 4 billion was 2010's biggest deal.

Other notable deals in the market were the sale by C&C of its spirits division to Scottish distillers William Grant & Sons and Hindustan Zinc's acquisition of Lisheen Mine. Other big contributors to activity was Ardagh Glass's EUR 1.7 billion takeover of Impress Holdings and the acquisition of Germany's Bauking by CRH.

Market Activity in 2011

In May of this year the Irish Times reported that M&A activity in the first quarter of 2011 rose by 58% compared to the first quarter of 2010 which represents the first jump in six years, according to a study by NCB Corporate Finance.

However the report cautions that the value of the deals continued to be relatively modest, totalling EUR 921.6 million during the quarter. Although EUR 921.6 million was an 83% increase over the EUR 505 million recorded in the same quarter in 2010, it was a significant decrease from the EUR 2.6 billion recorded in the fourth quarter of 2010.

Notable contributors to the increase in M&A activity were Glanbia's acquisition of US sports nutrition company BSN and transactions by Origin and Kerry Group resulting in a relatively active quarter for Irish food companies.

Legislative Developments

New Companies Bill

One of the most significant legislative developments in Ireland in 2011 was the recent launch by The Minister for Jobs, Enterprise and Innovation, Mr. Richard Bruton TD of the draft Companies Bill.

The consolidated Companies Bill (the "**Bill**") has been long awaited and will, when enacted, significantly change the company law landscape in Ireland. It is based on the General Scheme of Companies Consolidation and Reform Bill which was prepared by the Company Law Review Group which was set up by the Irish Government to reform and modernise the landscape of Irish company law.

The draft legislation contains 952 sections and six schedules on over 1400 pages of text and will be one of the largest pieces of legislation in the history of the State when it is complete. The draft consolidates the 15 existing Company Acts from 1963 as well as a significant number of statutory instruments and judgments.

Pillar A of the Bill has been published in advance of the completion of drafting of the entire Bill in order to allow people and businesses who will be affected to prepare for the changes made by the legislation. It is expected that the remainder of the Bill will be published in 2012 and that it be enacted as soon as possible thereafter.

The legislation recently published contains all provisions relevant to the private company limited by shares, which under the Bill will be known as "CLS" instead of "ltd", and which accounts for over 90% of companies presently registered in Ireland.

Some operating features of the new CLS will include the following:

- A CLS will be allowed to have only one director;
- A CLS will only be required to have one document in its company constitution, and the Bill provides for a default document to apply in all cases except where the company changes this constitution;
- A CLS will have the same legal capacity as a natural person, reducing the necessity to prepare long company constitutions, and reducing legal disputes caused by the ultra vires doctrine;
- A CLS will no longer be required to have a "physical" Annual General Meeting every year – it will be possible to do this by correspondence; and
- Other changes will include an exhaustive listing of the duties of directors (previously contained in case law) and of all criminal offences under company law.

The Bill contains a section known as "Pillar B" which will cover Public Limited Companies, Companies Limited by Guarantee, re-registrations, foreign companies and investment companies which is still being finalised and is expected to be published in late 2012.

COUNTRY UPDATE ON ITALY

Country Update on Italy

By Fabio Alberto Regoli, Jacobacci Sterpi Francetti Regoli De Haas & Associati, Milan, Italy (faregoli@jacobacci-law.com)

Introduction

After a couple of difficult years during which the focus was mainly on restructuring and litigation, the M&A market in Italy is picking up again, in particular acquisitions performed in the Italian market by foreign entities and French companies.

By virtue of the liquidity collected during the past years, in 2011 private equity funds also increased their investments in Italy.

The Italian market, affected as any other by the global crisis, is not lacking of transactions and potential targets. In general terms, the utility sector maintains a considerable potential for M&A activity, with particular reference to the photovoltaic and the gas sector.

New Rules on Merger Leveraged Buy-Out

Following Legislative Decree No. 39 dated January 27, 2010 (implementing the EU Directive 2006/43/EC on statutory audits of annual and consolidated accounts), a procedural rule for merger leveraged buy-outs has been changed.

According to the new wording of paragraph 5 of Article 2501-bis of the Italian Civil Code, in merger leveraged buy-outs, companies subject to the audit of the accounts must enclose to the merger project ("**progetto di fusione**") a report to be prepared by the subject appointed for the audit: (i) the chartered accountant, (ii) the auditing company or (iii) the board of statutory auditors, as the case may be.

In the event both the acquiring company and the target are subject to the audit of the accounts, only one report prepared by the auditors of one of them must be attached.

Prior to this amendment, only those companies subject to mandatory audit of the accounts by an external auditing company (such as listed companies, banks, insurance companies) were required to enclose the said auditors' report to the merger project.

The best practice has further clarified that:

(a) The report must be prepared by the companies which either voluntarily or mandatorily audit their accounts;
(b) The provision applies also when the board of statutory auditors is appointed for the audit of the accounts, in which case the board will have to be composed entirely of chartered accountants;
(c) Considering the report is mandatory, the shareholders of the companies involved cannot, even unanimously, waive it.

The main purpose of these amendments is to offer the minority shareholders of the target company and third parties (including creditors) as much information and detail as possible regarding the transaction and, in particular, the assessments of the directors as to the company resulting from the merger leveraged buyout.

2001-2011: The Tenth Anniversary of Legislative Decree 231/2001 (on Criminal Liability of Legal Entities) and its Effects on the Corporate Governance

The year 2011 has celebrated the tenth anniversary of Legislative Decree 231/2001 (the "**Decree**") which regulates the criminal liability of legal entities, such as companies, in Italy.

During this decade, the applicability of the Decree has been extended by several amendments. To date, the crimes considered by the Decree are: (i) frauds on the State or other public bodies; (ii) fraudulent issue of public grants; (iii) bribery, corruption and extortion; (iv) untrue corporate information, false prospectus for public corporations; (v) false auditor reports or notices, (vi) fictitious formation of share capital; (vii) illegitimate reimbursement of the share capital to the shareholders; (viii) unlawful distributions of profits and reserves; (ix) unlawful transactions on shares or quotas; (x) illegitimate distribution of company's assets by its liquidator; (xi) transactions which adversely affect company's creditors; (xii) illicit influence on the shareholders' meeting; (xiii) preventing the exercise of supervisory authorities' functions or the ability of shareholders and other corporate bodies to control the company's activity; (xiv) manipulation of the market; (xv) IT frauds; (xvi) terrorism and subversion of public order; (xvii) certain sexual crimes and crimes against the personality of individuals; (xviii) certain crimes related to labour healthy and safety; (xix) money laundering; (xx) certain practices connected to the activities of the organized criminal structures; (xxi) false money; (xxii) some abuses against the industrial activities and trade (i.e. boycott, lockout, unfair competition practices); (xxiii) certain infringements of the copyright; (xxiv) certain crimes related to statements made to the public authority; and (xxv) certain environmental crimes.

The market reaction to the Decree in this decade shows that, after scepticism at first, the provisions are now viewed as a way to improve the companies' structure, governance and internal control and no longer solely as potential additional cost to be borne by the companies.

Related Parties Transactions: A Long Welcomed Regulation

On January 1, 2011 the deadline for S.p.A.s listed on the stock exchange to implement new internal procedures (complying with the set of rules provided under the Regulation on Related Parties Transactions adopted by CONSOB March 12, 2010) expired.

The Regulation was long expected since, in 2004, an amendment to Article 2391-bis of the Italian Civil Code delegated the Authority to set out principles and guidelines on decision making and information disclosure processes for public companies.

Following a large debate, and two rounds of consultations with professionals, the Regulation was completed with the adoption of the Guidelines dated September 24, 2010, entered into force on December 1, 2010.

The new discipline provides that certain related parties transactions exceeding a given threshold (e.g. 5% of the fair value in case of transactions concerning financial instruments) must be approved by the committee of independent directors. Failing such approval, these transactions can be authorized by the General Meeting according to either the ordinary majority rules or with the favourable vote of the non-related shareholders' majority (so called 'whitewash').

Minor transactions (falling below the threshold) are subject to the previous release of an opinion (although non-binding) of the independent directors.

Certain transactions are excluded, in full or in part, depending on their value or if implementing certain policies approved by the shareholders, or if negotiated at arm's length or based on standard conditions or even if entered into on an urgent basis.

A set of rules governs the process of information disclosure to the market, setting out specific forms to be filled and released for each concerned transaction, and also listing all information to be mandatorily included in financial reports. A less strict regime applies to newly listed and smaller companies.

COUNTRY UPDATE ON JAPAN

Joint Venture in Japan: What to Look For in Due Diligence

By Naoko Inoue Shatz & Qingqing Miao, Shatz Law Group PLLC, Seattle, USA (ninoue@shatzlaw.com)

Japan has had its share of economic challenges for well over a decade. These days it seems that most of the news from Japan is more negative than positive, and it is easy to forget that Japan remains one of the largest economies in the world. For Japanese business people the country's strong currency can be problematic when it comes to exports but can also be an opportunity when considering overseas investment. For those interested in doing business with a Japanese investor, joint ventures are an attractive option because compared to M&As, forming a multinational joint venture is generally less risky. Besides corporate and tax laws, there are two areas that have been often updated or amended: (i) the Personal Information Protection Act; and (ii) Japan's Labor and Employment Laws. These areas can easily trigger oversight in joint venture transactions, and it is important for an attorney involved in joint ventures with Japanese companies or investors to understand these provisions.

Personal Information Protection Act ("PIPA")

The PIPA came into effect on April 1, 2005. The PIPA requires that entities manage and protect the privacy rights of Japanese citizens while permitting personal information to be used for legitimate business purposes.

Personal information means a person's name, date of birth, and other information that enables identification of a living individual. For example, it includes records in an electronic address book, business cards, marketing lists, and email messages displaying names and email addresses. Images of an individual can also be considered personal information.

The PIPA applies to government, private entities or business operators handling personal information. However, persons and entities who handle the personal information of less than 5,000 individuals and ordinary private use of personal information are exempted from the requirements of the PIPA.

Under the PIPA, a business operator handling personal information must specify the purpose of utilization and is obligated to promptly notify each individual of the purpose of utilization upon receiving personal information, unless the purpose of utilization has been publicly announced. The business operator cannot use acquired information for any purpose beyond the scope of their purpose of utilization without prior consent by the individual. Similarly, the PIPA limits entities' ability to transfer such personal information to a third party without prior consent.

Violation of the PIPA can result in administrative penalties, ranging from a fine of not more than 300,000 Japanese yen (approx. USD $3,912.62) to imprisonment for up to six months. A company will be held liable for a fine when its representative, agent, employee, or any other person engaged has violated the PIPA. Liabilities could also be extended to individual employees of a company.

Labor and Employment Laws

The Labor Standard Act ("**LSA**") was enacted in 1947 and, the most recent amendment came into effect on April 1, 2010. In this recent amendment, changes in overtime pay are highlighted. The amended LSA sets out additional requirements for compensation and requires that employees must be paid at 150% of their standard rate if the accrued overtime within any given month is over 60 hours. Before the new requirement, the overtime pay rate was 125% of the employees' standard rate regardless of the actual number of accrued overtime hours. The amended LSA further reinforces the original requirements for overtime pay by mandating that the employees need to agree to the compensation and overtime pay if their accrued overtime is over 45 hours in any given month. Other provisions regarding over overtime pay requirements remain effective, including the pay requirement regarding unusual working hours. For example, employees are entitled to receive 160% of their standard rates, if they work between 22:00 and 5:00 ("**Night Shift**"), and they must be paid at 175% of their standard rates if the hours of the Night Shift reach over 60 in any given month.

The Employment Contract Act ("**ECA**"), a new law, came into effect on March 1, 2008. There is no concept of "at will employment" in Japan and the employers' rights to terminate or discipline employees are limited. However, the concept of a monetary resolution system for dismissal of employees was contemplated in the ECA due to the recent increase in the number of cases arising from wrongful termination claims. The main provisions of the ECA are: (i) employment contracts need to be executed or amended by mutual agreement of an employee and an employer; (ii) employment contracts need to be confirmed in writing to the extent possible; (iii) terms and conditions of an employment contract are invalid if they are unfavorable to an employee and are contrary to the employment policy; (iv) any relocation or transfer is invalid if such arrangement is considered an abuse of the employer's rights; (v) dismissal and disciplinary actions are invalid if such decisions are unreasonable; (vi) a fixed-term employment contract may not be cancelled without a compelling reason; and (vii) employers are required to give a contractor or a part time employee the opportunity to apply for a full time position when hiring a new full time employee.

Local laws such as these are often unexpected and consequently can create unnecessary stress in the course of negotiation. Accordingly, it is crucial that lawyers involved in joint ventures and their clients understand the costs and risks associated with the compliance of these Japanese laws as early as possible in order to avoid potential costly surprises.

COUNTRY UPDATE ON KOREA

Country Update on Korea

By Philippe Shin, Shin & Kim, Seoul, Korea (pjshin@shinkim.com)

Introduction of Cash-Out Mergers

Cash-out mergers, which have caused controversy over their enforceability and scope under the Korean Commercial Code ("**KCC**") currently in effect, will be fully permitted under the amended KCC, which will take effect on April 15, 2012. The amended KCC allows not only cash but also "other corporate assets" to be used as merger consideration. "Other corporate assets" include, among other things, bonds, shares and other securities.

As the amended KCC repeals the current limit on the total principal amount of bonds issuable by a Korean corporation, there is likely to be an increase in the number of cash-out mergers where consideration is paid in bonds. Triangular mergers, where consideration consists of shares of the surviving company's parent, are also expected to become more frequent.

The amended KCC prohibits the use of cash-out mergers in some other types of corporate restructuring, such as a merger of a spun-off company into another company and comprehensive share swap.
Cash-out mergers could help reduce management costs by squeezing out minority shareholders or be utilized as an alternative tool for delisting. Cash-out mergers may raise concerns about minority shareholder protection, although, at least in theory, minority shareholders can protect their interests by exercising the appraisal right granted to dissenting shareholders in a merger. It is still uncertain whether unfair cash consideration for a merger would constitute legal grounds for a minority shareholder to file a lawsuit to void the merger.

Introduction of Hapja Johap and Yuhan Chaekim Hoesa

Recent amendments to the KCC include the addition of two new types of business entities: hapja johap ("**partnership association**") and yuhan chaekim hoesa ("**LLC**").

A. Hapja Johap

A hapja johap ("**partnership association**") is a business entity similar to a US limited partnership. A partnership association can be established upon an agreement among (i) one or more managing partners who agree to bear unlimited liability in the partnership association and (ii) one or more limited partners, whose liability is limited to their capital contribution in the partnership association. Unlike the more traditional jusik hoesa (joint stock corporation) or yuhan hoesa, a partnership association is not a separate legal entity but, instead, is recognized as an "association" authorized by law to engage in business (similar to johap).

The limited partnership agreement may provide for a ratio of allocation of profits and losses among its members which does not necessarily reflect the ratio of contribution to capital.

The managing partner has a fiduciary duty to the other partners to manage and represent the partnership association with care and loyalty. The managing partner may not sell, assign or transfer her interest in the partnership association to a third party without the unanimous consent of all partners. Limited partners must refrain from managing or representing the partnership association.

Tax issues are unsettled; however, many believe double taxation should not arise and a partnership association should receive pass-through tax treatment.

B. Yuhan Chaekim Hoesa

A yuhan chaekim hoesa ("**LLC**") is similar to a limited liability company in the United States or akin to a godo kaisha in Japan. The LLC can be established upon a capital investment by one or more persons and registration of its incorporation. Capital contributions can be made in cash or other tangible assets except hose whose reasonable market value is difficult to determine (e.g., services).

There is no minimum capital requirement to establish an LLC. While a manager is required (either a person or a legal entity), there is no mandate to have directors or an auditor.

A member is allowed to transfer her interests in the LLC to a third party with the consent of other members or if permitted in the LLC's articles of association. Unless otherwise stated in the articles of association, a member may obtain a refund of her investment in the LLC by exiting at the end of the LLC's fiscal year upon six (6) months' prior notice to the LLC, subject to certain restrictions.

Tax issues are unsettled; however, many believe the LLC will be treated similarly to a jusik hoesa.

Hapja johap and yuhan chaekim hoesa will likely appeal to small-sized companies or investors with limited objectives. The utilization of the new company vehicles, however, will depend much on their tax treatment.

COUNTRY UPDATE ON PORTUGAL

Country Update on Portugal

By Luís Pacheco Pires, Garrigues LLP, Lisbon/Portugal (lpp@garrigues.com)
and Luís Pedro Oliveira, Garrigues LLP, Lisbon/Portugal (luis.pedro.oliveria@garrigues.com)

Economic Background

Over the last few years Portugal (and several other countries of the Euro Area) has been under strong international and, particularly, EU pressure to correct its public finance disequilibrium.

After a period of great economic and social expansion, especially in the 90's due to the integration in the EEC/EU and the consequent access to structural and cohesion funds, Portugal has faced consecutive poor economic performances and a general loss of competitiveness in the last decade. In fact, and despite said economic growth, Portugal remained as one of the lowest per capita GDP countries in Western Europe and its unemployment rate has steadily increased, reaching 10.8% in 2010.

This fragile economic performance has dropped even more with the emergence of the 2008 global turmoil in the financial markets. In 2008, trying to cope with the global crisis, the Portuguese government, in line with other EU countries expected massive public investments to serve as a definitive driving force for economic recovery. Portugal launched several public investment programs, a few of them with a decisive impact on Portuguese public expenditure, notably the new Lisbon international airport and high-speed train links between Lisbon and Madrid, Lisbon and Oporto, Oporto and Vigo (which seems to be currently on hold). At the same time, the international turmoil unveiled serious director faults on a local credit institution (BPN – Banco Português de Negócios), leading the Portuguese government to nationalize it in order to prevent its collapse and also the possible contamination of other Portuguese financial institutions. Now BPN is about to be privatized by the Portuguese Government through a direct negotiation with Banco BIC (bank based in Angola).

As the global crisis became deeper and economic takeoff was very slow, or even non existent, and as a consequence of the public investments that had been undertaken, Euro Zone countries started dealing with serious problems concerning excessive levels of public debt and began the implementation of successive austerity packages, thus trying to refrain public debt levels, whose figures were far above ceiling levels for countries in the EU (e.g. Portuguese account deficit was at 10% of GDP and public debt at around 90% of GDP as of 2010).

This entire situation has obviously left an intense mark on the Portuguese market. The overall local scenario is very depressed with a continuous fall of the stock markets and a significant decline in corporate M&A activity. There are, however, some relevant expectations of a slight pickup in M&A activity as a result of the mandatory implementation of a privatization plan for 2011-2013 of several strategic state-owned companies (or partially owned), covering energy (EDP – Energias de Portugal, S.A.; Galp Energia, SGPS, S.A.; and REN – Redes Energéticas Nacionais, SGPS, S.A.), transport (ANA - Aeroportos de Portugal S.A.; TAP SGPS, S.A.; and CP Carga – Logística e Transportes Ferroviários e Mercadorias, S.A.), communications (CTT – Correios de Portugal, S.A.), insurance (Caixa Seguros e Saúde, SGPS S.A.) and paper sectors (INAPA Portugal – Distribuição de Papel, S.A).

The conditions for such privatization operations are set out by the Council of Ministers. Privatizations can be made through public tender, public offer or direct negotiation. Taking into consideration the current status of the stock market, the Portuguese government would be constrained to privatize by direct negotiation, which may contribute to an increase in M&A activity due to the arrival of different investors in the companies involved in the privatizations.

Legal developments

1. Liberalization of the share capital of Portuguese private limited liability companies ("**sociedades por quotas**")

Within the above described market crisis scenario, Portuguese government enacted Decree-Law no. 33/2011, of March 7, 2011, as a way to promote competitiveness and entrepreneurship by liberalizing the share capital of Portuguese private limited liability companies.

A particular relevant measure adopted by this decree-law is that the share capital amount in private limited liability companies is now freely determined by the shareholders, in accordance with their resources and settled in the amount deemed convenient for the development of the relevant corporate activity. As a result, the mandatory minimum share capital of EUR 5,000 for these type of companies has been removed. On the other hand, the par value of the quotas, which value shall not be less than EUR 1 has also been amended. As a consequence, companies with a share capital of EUR 1 in the case of incorporation by a sole shareholder (sole shareholders limited liability companies) or with a share capital in the amount of EUR 1 per shareholder (with a minimum of two shareholders and thus a share capital of at least EUR 2) is now allowed.

Moreover, the possibility for shareholders to carry out the payment of their capital contributions until the end of the company's first financial year is also permitted. In such case, a declaration by the shareholders, at the incorporation date, stating that the they have already undertaken their capital contributions or commit to undertake such payment by the end of the company's first financial year, must be made.

2. Changes to insolvency legislation

The Memorandum of Economic Financial Stability Facility of April 2011 (the "**Memorandum**") contains certain specific changes to the insolvency legislation that will be implemented by the end of November 2011, with technical assistance from the IMF, in order to facilitate orderly and efficient corporate and household debt restructuring. As to court procedure, certain amendments shall be made to the Portuguese Insolvency Code in order to ease the rescue of viable firms. Such amendments shall include, among others, a fast track court approval procedure for restructuring plans, as well as measures designed to create incentives for voluntary out-of-court restructurings to be set up in line with international best practices. Actions aimed at authorizing tax and social security administrations to use a wider range of restructuring tools based on clear criteria will also be undertaken. Finally, the Memorandum also foresees the launching of a campaign in order to create an effective rescue culture, raising awareness of the restructuring tools available for early rescue of viable firms by promoting training and new information means for all involved, including judges, insolvency administrators, court clerks, lawyers, company directors, accountants and auditors.

COUNTRY UPDATE ON SPAIN

Shareholder Rights in Listed Companies

By Alessandra deMagalhaes, Garrigues LLP, New York (alessandra.demagalhaes@garrigues.com)

Spanish Law 25/2011 ("**Law 25/2011**"), which was approved on August 1, 2011, and will enter into force on October 2, 2011, adopts, amongst other things, the implementation of Directive 2007/36/EC of the European Parliament and of the Council, dated July 11, 2007, regarding the exercise of certain rights by shareholders in listed companies ("**Directive 2007/36/EC**").

Directive 2007/36/EC prescribes that member states of the EU must adopt legislation to ensure that shareholders of listed companies can exercise their rights, in particular, voting rights, without obstacles, even if they do not reside in the member state in which the listed company has its registered office.

As a result, Law 25/2011 has adopted detailed provisions aimed at facilitating the exercise of shareholder rights in Spanish listed companies.

General Principle

As a general principle, a Spanish listed company must ensure equal treatment for all shareholders that are in the same position with regard to information, participation and exercise of voting rights in the general meeting.

Call of a General Meeting

The announcement of the call of the general meeting must be made in a manner that will ensure the quick and non-discriminatory access to information by all the shareholders.

In particular, the announcement of the call will be made using, at least, the following methods: (i) publication in the Official Gazette of the Spanish Commercial Registry or in one of the main newspapers of Spain, (ii) the web page of the Spanish securities regulator (Comisión Nacional de Mercado de Valores), and (iii) the web page of the listed company.

Content of the Call Notice

The call notice must include, amongst other things, (i) the record date by which the shareholders must have the shares registered in their name in order to participate and vote in the general meeting, (ii) the place and manner where the shareholders may obtain the documents and proposals of resolutions, (iii) the web page of the listed company where the information will be made available, and (iv) clear information regarding the procedures that the shareholders will need to follow in order to participate and vote in the general meeting (i.e. rights to request information, to include items on the agenda or to table draft resolutions, procedures to issue votes by proxy, or by mail or other electronic means).

Access to Information Prior to the General Meeting

In order to ensure access by the shareholders to the relevant information for the general meeting, the web page of the Spanish listed company will have to publish from the date of the call notice until the date of the general meeting, the following information, (i) the call notice, (ii) the total number of shares and voting rights, by class if applicable, at the date of the call, (iii) the documents that will be made available at the general meeting, in particular, the reports from directors, auditors and independent experts, (iv) the complete texts of the proposed resolutions, or if no resolution exists, a report from the governing body on each item of the agenda, and (v) the forms to vote by proxy and to vote by mail or other electronic means, unless the company sends such forms directly to each shareholder.

Additionally, the shareholders may request from the directors of listed companies, up to seven days before the general meeting or during the meeting, amongst other, clarifications regarding public information made available to the Spanish securities regulator (Comisión Nacional de Mercado de Valores), from the date of the last general meeting, as well as the auditors' report. Nevertheless, the directors are not obliged to reply to specific questions when the information is available on the company's web page.

Participation in the General Meeting

The participation in the general meeting and the right to vote may be exercised directly by the shareholder through mail, electronically or any other means of communication established in the by-laws, provided that the true and correct identity of the person that participates or votes and the security of electronic communications are guaranteed.

The regulations of the general meeting may govern the exercise of such rights that may include any or all of the following means, (i) real time transmission of the general meeting, (ii) real-time two way communication enabling shareholders to address the general meeting from a remote location, and (iii) a mechanism for casting votes, before or during the general meeting, without appointing a proxy holder who is physically present at the meeting.

Shareholders may also participate and vote in a general meeting by appointing any person as a proxy holder to attend and vote in his name.

The proxy holder must vote in accordance with the instructions given by the shareholder and must keep the instructions for a period of one year. If the proxy holder represents more than one shareholder he must vote in accordance with each shareholders instruction.

The proxy holder must inform the shareholder if any conflict of interest exists.

The following situations are considered a conflict of interest: (i) if the proxy holder is a controlling shareholder of the company or entity controlled by it, (ii) if the proxy holder is a member of the governing or supervisory body of the company, of its controlling shareholder, or of a company controlled by it, (iii) if the proxy holder is an employee or auditor of the company, the controlling shareholder or an entity controlled by it, and (iv) if the proxy holder is an individual related to the others (i.e. spouse, partner, ascendants, descendents, siblings and respective spouses).

Special Rules for Financial Investment Companies

A financial investment company that acts as a financial intermediary may also act as representative of its client, if duly authorized as its representative. Law 25/2011 establishes special rules, for these financial intermediaries, permitting them to vote in a divergent manner pursuant to the different instructions received, allowing them to delegate the vote in a third party designated by the client and requiring that they provide the company, seven days prior to the general meeting, a list identifying the clients it represents, the number of shares that it will vote in the name of the client and the instructions to vote that it has received.

Voting Results

Finally, the listed company must publish the resolutions that were adopted and the voting results on its web page within five days from the general meeting.

COUNTRY UPDATE ON SWITZERLAND

Proposed Swiss Bill on Market Abuse to Substantially Amend Public Takeover Rules

By Lorenzo Olgiati, Schellenberg Wittmer, Zurich, Switzerland (Lorenzo.Olgiati@swlegal.ch)

On August 31, 2011, the Swiss government (Federal Council) submitted to the Swiss Parliament the eagerly awaited bill and legislative report on securities market crimes and market abuse (*Boersendelikte und Marktmissbrauch)* proposing amendments to the Federal Act on Stock Exchanges and Securities Trading ("**SESTA**"). The proposed bill's main purpose is to increase the effectiveness of Swiss securities market regulation, to strengthen the functioning and integrity of the Swiss financial center and further align the regulations of (the non-member state) Switzerland with the European Union's Market Abuse Directive (Directive 2003/6/EC).

Main focus: Proposed Amendments to the Current Regulation on Financial Market Abuse

The bill proposes to introduce new rules in Swiss criminal law and financial supervisory law which shall (more) efficiently sanction abusive market behaviour on the financial markets. It tightens the existing rules in particular with respect to insider trading, price manipulation, non-compliance with shareholder disclosure rules and other abusive practices.

In order to enforce these rules, it is proposed to concentrate the competencies relating to criminal proceedings (insider trading, price manipulation) in the hands of the Office of the Federal Prosecutor instead of the cantonal prosecutors. At the same time, the supervisory competencies of the Swiss Financial Market Supervisory Authority ("**FINMA**") shall be expanded and its enforcement capabilities strengthened. Among others, the FINMA would obtain the competencies to order – as preliminary measures – a ban to purchase additional target shares and a full suspension of the voting rights of persons failing to comply with the disclosure and notification requirements for significant shareholders. Furthermore, a new maximum fine for an intentional breach of the shareholder disclosure rules under the SESTA has been set which shall amount to CHF 10 million.

Substantial amendments to Swiss public takeover rules proposed

In addition to the new provisions relating to abusive market behavior, the Swiss Federal Council took the opportunity to propose additional substantial amendments to the SESTA in the field of public takeovers.
Among the important changes are:

(i) the expansion of the scope of the Swiss takeover rules which in the future shall not only apply to issuers incorporated in Switzerland but also to those non-Swiss issuers having their equity securities mainly listed on a Swiss stock exchange;

(ii) the amended requirement to hold at least 3% of the voting rights relating to a target company in order to generally qualify as a party to a public takeover procedure; currently, shareholders holding a stake of at least 2% of the voting rights are granted the right to participate in the takeover proceedings as a formal party (so-called qualified shareholder). As a result, they enjoy full procedural guarantees, in particular the right to be heard including access to the records at the Swiss Takeover Board ("**TOB**"), and the right to appeal. The disclosure obligation for significant shareholders under the SESTA, by contrast, is only triggered by stakes exceeding 3% of the voting rights. As a consequence, in companies with widespread shareholdings, it is currently virtually impossible for a bidder to identify in advance shareholders who hold a stake between 2% and 3% and who are thereby potential parties to the takeover proceedings. From a bidder's point of view, this unknown factor, as well as the potential for appeals-induced delays reduces the certainty of a transaction. In order to improve transparency, an increase of the voting rights threshold from 2% to 3% for qualified shareholders has now been proposed, less than 3 years after the introduction of the original regulation; and

(iii) most importantly, the proposed changes to the minimum price rules, i.e. the proposed abolishment of the payment of a control premium. The proposed abolishment of the control premium is briefly outlined in the following.

Based on a recent submission of the TOB only published and put up for public consultation in the first quarter of 2011, the Swiss Government in its bill proposes to fundamentally amend the SESTA-minimum price rules applicable in case of mandatory offers or voluntary offers for more than 33.33 % of the target's equity securities. Under the current Swiss mandatory minimum price rules, while the offer price must at least match the volume-weighted average stock exchange price of the last 60 trading days ("**VWAP**"), it is permissible for the bidder in his public offer to provide for a discount of up to 25% compared to the highest price paid by the bidder for equity securities of the target company during the 12 months preceding the public offer. As a consequence, a bidder can, therefore, in the twelve months-period prior to the launch of its public offer, pay a (control) premium of up to 33% of the offer price in any previous stake building transactions.

The new bill proposes, however, to abolish the possibility of a bidder to pay a control premium. The pertinent provision requires that the offer price shall equal the higher of (i) the VWAP or (ii) the highest price paid by the bidder for equity securities of the target company during the preceding 12 months. The proposed rule is a good example for the ongoing alignment of Swiss regulations with EU law, in the case at hand with the corresponding rule set forth in the Takeover Directive (Directive 2004/25/EC of the European Parliament and of the Council of April 21, 2004 on takeover bids). While the principle of equal treatment of shareholders of the target company is the key argument made in favor of the full abolishment of the control premium under Swiss law, the proposal is not undisputed; in essence based on the argument also made in other jurisdictions that the abolishment would constitute an unnecessary and inadequate interference with the freedom of contracting, if one accepts the economical concept of control as representing an economic value warranting the payment of a special control premium.

The proposed bill is expected to be debated in the two chambers of the Swiss Parliament in the coming months. An amended Federal Act on Stock Exchanges and Securities Trading will enter into force on January 1, 2013 at the earliest.

COUNTRY UPDATE ON UNITED KINGDOM

The Takeover Code

By Frances Murphy, Slaughter and May, London, UK (frances.murphy@slaughterandmay.com)

A new edition of the UK Takeover Code (the "**Code**") came into effect on September 19, 2011.

The changes to the Code follow a lengthy period of extensive consultation by the UK Takeover Panel (the "Panel"), the body responsible for overseeing takeovers in the UK, in response to comments made during the bid by Kraft Foods for Cadbury which completed in early 2010.

Transitional arrangements are in place for bids in progress on September 19, 2011.

SUMMARY OF SOME KEY CHANGES

Changes aimed at increasing the protection for target companies against protracted 'virtual bid' periods

When a target company makes an announcement that commences an offer period, it will be required to: (i) identify all potential bidders from whom it has received an approach (and which it has not unequivocally rejected) or with whom it is in talks (including potential bidders who are not named in any rumour and speculation and who are not responsible for the event that has triggered the announcement requirement), and (ii) set out the 28 day deadline by which the potential bidder(s) will be required to clarify its/their position(s). The Panel believes that this will incentivise potential bidders to ensure secrecy and minimise the chance of any leaks.

The target will be free publicly to announce the existence and identity of any potential bidder(s) at any time it considers appropriate and parties will not be allowed to agree otherwise through contract.

Any publicly named bidder must, within a fixed period of four weeks following its naming, and in the absence of an extension to that period, either announce a firm intention to make an offer or announce it will not make an offer, whereupon it will be subject to the restrictions on future bids referred to in Rule 2.8.

The Panel has said that it will "normally" grant an extension to the 28 day deadline if the target company so requests but will only do so shortly before the expiry of the deadline, so it will not be possible for parties to agree a longer negotiation period at the outset of the 28 day period.

Changes aimed at strengthening the position of the target company

With limited exceptions, a general prohibition has been introduced against inducement fees, implementation/merger agreements and any other offer-related arrangements. This covers traditional deal protection measures such as matching rights, exclusivity, and no-shop provisions.

Target companies will only be able to agree to very limited obligations: to maintain confidentiality of information, not to solicit the bidder's employees, customers or suppliers, and to provide assistance or information needed to obtain regulatory approvals. Bidder companies, on the other hand, will be permitted to agree to more onerous obligations, including reverse break fees and standstills. Irrevocable undertakings and letters of intent will still be permitted.

Changes aimed at increasing transparency

Advisory fees such as fees charged by financial advisers, brokers, lawyers, PR consultants and other advisers including management consultants and specialist valuers must be disclosed.

Bidders are required to disclose a greater level of detail about the financing facilities used to implement the offer.

Changes aimed at providing greater recognition of employee interests

Where a bidder or target board makes a statement during the course of an offer period that relates to its strategic plans or its intentions regarding the employees of either party, it will be "held" to such statements for a period of 12 months (or for such other period as may be specified in the statement). If it subsequently acts contrary to its stated intentions and cannot show the Panel that the statement was reasonable at the time it was made, the Panel reserves the right to take disciplinary action against that party.

Employee representatives must be told that an offer is being contemplated at the start of the offer period (which is very often earlier than a formal offer announcement).

Employee representatives continue to have the right to include a statement in the target board's circular setting out their views on the effects of the offer on employment.

COUNTRY UPDATE ON THE UNITED STATES OF AMERICA

Buying an FCPA Violation: The Danger of Successor Liability

By Justin Connor, Senior Counsel, Spacenet, McLean, VA, USA (justin.connor@spacenet.com)
and Michael Volkov, Mayer Brown LLP, Washington, DC, USA (mvolkov@mayerbrown.com)

Overview

Companies involved in mergers and acquisitions need to pay careful attention to the risk of liability under the Foreign Corrupt Practices Act ("**FCPA**"). As a number of recent cases have shown, unwary companies can "purchase" FCPA liability by failing to conduct appropriate due diligence of their intended transaction target. On the other hand, companies alert to those risks have been able to avoid successor liability altogether or, more frequently, to obtain assurances from the Department of Justice ("**DOJ**") through the Opinion Procedure. Advance planning allows the company to understand and effectively price into the deal the scope of potential FCPA liability before closing the transaction, and allows the acquirer to plan the timing for integrating the target company into the acquirer's anti-corruption compliance program. This note reviews the FCPA liability risk involved in mergers and acquisitions and discusses strategies counsel can use to avoid that risk.

Background

The purpose of the FCPA is to prohibit the payment of bribes to foreign officials for the purpose of obtaining or retaining business. The FCPA consists of a prohibition on "bribery" of foreign officials and a requirement that companies keep accurate books and records and maintain a reasonable system of internal controls.

The anti-bribery provision prohibits a "person" from making an offer, payment, promise, or authorization to pay any money or thing of value to any foreign official, with the intent to:

(i) Influence any act or decision by a foreign official;

(ii) Induce the foreign official to act in violation of his or her lawful duty;

(iii) Secure any improper advantage; or

(iv) Persuade a foreign official to influence any act or decision of a foreign government or agency or public international organization in order to obtain or retain business.

The accounting provisions require companies to keep accurate books and records, and maintain an adequate system of internal accounting and financial controls with proper authorization. As a result, a company's books and records must reflect any payments, bribes, or facilitation payments in its accounting books to allow preparation of financial statements that conform to generally accepted accounting principles.

The FCPA applies to "issuers" and "domestic concerns," and any individual, officer, director, employee, or agent of any issuer or domestic concern. The FCPA has broad extra-territorial reach and can impose criminal liability for violations by parties located outside the United States. Foreign companies or persons are subject to prosecution under the FCPA if they act, directly or through agents, to further the corrupt payment while in the United States, or if they use any instrumentalities of interstate commerce of the United States.

Corporations face criminal penalties up to $2 million for each violation of the anti-bribery prohibitions and criminal fines of up to $25 million for violation of the accounting provisions. For anti-bribery violations, individuals are subject to up to five years in prison and up to $250,000 in fines. Individuals can face civil penalties up to $10,000. For accounting violations, criminal penalties for individuals can reach $5 million and 20 years imprisonment for each offense.

The FCPA also proscribes payments made through third parties (e.g. agents, consultants, distributors), including joint venture partners, with "knowledge" that a portion or all of the payments will be made, directly or indirectly, to a foreign official. It is not necessary to have actual knowledge that a payment will be made to a person by a third party. Deliberate ignorance or conscious disregard of the facts can also constitute knowledge of a payment.

Successor Liability

Companies may be held liable for civil and criminal violations of the FCPA committed by the target company even if those acts occurred prior to the acquisition or merger and were entirely unknown to the acquiring company. A company may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in some cases, immediately following an acquisition or merger). Due diligence does not eliminate an acquiring company's liability. Once a company identifies potential FCPA violations, the acquiring and target companies may voluntarily disclose FCPA violations to the DOJ and the Securities Exchange Commission ("**SEC**") to allow for the opportunity to resolve any such potential liabilities.

The impact of FCPA liability in the mergers and acquisitions context is wide-ranging. FCPA violations may impact the transaction price, deal structure and require specific warranties and indemnifications in the purchase agreement. Additionally, the discovery of FCPA violations may cause delay or even termination of a proposed deal, and create specific integration challenges when a deal is completed.

The DOJ and SEC adopted the concept of "successor liability" starting in 2003. The government has continually reiterated that companies can escape criminal FCPA liability by conducting rigorous pre-closing due diligence and disclosing any violations discovered prior to closing the deal.

Recent enforcement actions involving FCPA issues identified during pre-acquisition due diligence drive home the need for effective pre-closing due diligence. For example, Snamprogetti, a subsidiary of ENI, engaged in a bribery scheme for 10 years, which ended in 2004. In 2006, ENI sold Snamprogetti to another company, Saipem. Four years after the acquisition closed, in 2010 Snamprogetti incurred FCPA criminal violations and agreed to pay a $240 million fine (Both its previous and current shareholders, ENI and Saipem, were jointly liable for the fine).

In 2005, Dimon Inc. and Standard Commercial Corporation merged to form Alliance One. Five years later, the DOJ brought a criminal case against Alliance One for FCPA violations committed by foreign subsidiaries of Dimon Inc. and Standard Commercial Corporation which had occurred before the merger. The foreign subsidiaries entered guilty pleas and Alliance One cooperated and, under the terms of the guilty plea, was required to retain an independent compliance monitor for three years.

Due Diligence

The scope and depth of an FCPA pre-acquisition due diligence must include an assessment of bribery, books and records, and internal controls risks. The nature and extent of the inquiry will depend on factors such as the nature and location of the company's business. For example, a business model that involves frequent interaction with government regulators or government customers may require more scrutiny than one that does not. In addition, the nature of the business may require scrutiny of specific areas, including, inter alia, political contributions, lobbying activities, and payments to customs agents.

There is limited legal authority regarding the scope of due diligence required for transactions – it is "an art, not a science." In fact, due diligence is not a legal defense, but only minimizes the risk of successor liability when coupled with the acquiring company's demonstrated commitment to FCPA compliance as shown through an active and vigorous compliance regime.

As part of a due diligence inquiry, the acquiring company should request measures and provisions in contracts such as warranties and indemnifications for good governance, accurate recordkeeping and anti-bribery efforts, and overall anti-corruption compliance. There also may be a need to implement an enhanced FCPA compliance program, invoke the DOJ Opinion Procedure to obtain an opinion on the proposed transaction (which can be a lengthy process), voluntarily disclose the discovery of FCPA violations to the DOJ to allow for the opportunity to resolve any such potential liabilities, halt illegal conduct and dismiss officers and employees as necessary and create a remediation plan.

The DOJ has taken a strict approach to the length and extent of the pre-acquisition due diligence requirement. In the DOJ Opinion Procedure Release, No.: 08-02, dated June 13, 2008, Halliburton sought to acquire a UK company but, by the terms of the acquisition, was restricted from access to certain relevant FCPA-related information. The DOJ stated it would take no action against Halliburton for any subsequently determined violation contingent on Halliburton's commitment to conduct a detailed internal investigation and promptly report back to the DOJ. The high standard of the Halliburton commitments is a guide of sorts for companies as to the extent of due diligence analysis sought by DOJ.

Do Not Be Penny Wise or Pound Foolish

For businesses engaged in global expansion and acquisition of foreign companies, an ounce of prevention is the best medicine. Implementation and execution of pre-acquisition anti-corruption due diligence is a must before entering strategic alliances, joint ventures or partnerships with new businesses. Any such due diligence should necessarily include review of business practices, contracts, payment procedures, and accounting procedures.

The DOJ and SEC have announced and are pursuing an increased and aggressive level of enforcement activity under the FCPA. Businesses must be particularly careful when engaging in mergers and acquisitions, whether acquiring other companies or being acquired. Due diligence in these situations is critical and must encompass the full range of FCPA compliance issues.