International M&A and Joint Ventures

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This article reviews developments in 2010 in international mergers and acquisitions (M&As) and joint ventures (JVs) in Argentina, Australia, Austria, Denmark, Germany, India, Israel, New Zealand, the United Kingdom, and the United States. Additional reports for developments in Canada, Croatia, Italy, Japan, the Netherlands, Poland, Russia, Spain, Sweden, Switzerland, and Turkey are available on the committee's website.[1]

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1. For the full article *see* International M&A and Joint Venture Committee, Newsletters and Publications, http://apps.americanbar.org/dch/more.cfm?com=IC120000&mod=11. The committee editors of the article are Duco de Boer (Stibbe), who also co-authored the section on the Netherlands; Philip Johnson; and Mark Katz (Davies Ward Phillips & Vineberg LLP). The authors of the full article are: Argentina–Saúl Feilbogen and Vanessa Balda (Vitale, Manoff & Feilbogen) and Marcelo Bombau and Marcelo den Toom (M&M Bomchil); Australia–Ezekiel Solomon, Andrew Finch, and Michael Scarf (Allens Arthur Robinson); Austria–Paul Luiki and Maria Thierrichter (Fellner Wratzfeld & Partners); Canada–Gordon Cameron (Stikeman Elliott LLP) and Sandra Walker (Fraser Milner Casgrain LLP); Croatia–Miroljub Macesic and Jelena Zjacic (Macesic & Partners); Denmark–Vagn Thorup, Jacob Hoegh Madsen, and William Kanta (Kromann Reumert); Germany–Dr. Hartmut Krause (Allen & Overy LLP); India–H. Jayesh, Bhara Budhalia, Nitu Agrawal (Juris Corp.), and Nusrat Hassan (D.H. Law Associates); Israel–Ron Lehmann (Fischer Behar Chen Well Orion & Co.); Italy–Fabio Regoli (Jacobacci Sterpi Francetti Regoli de Haas & Assocs.); Japan–Pamela Fuller; the Netherlands–Duco de Boer (Stibbe) and Nancy Matos (Baker McKenzie); New Zealand–David Quigg, John Horner, and Asha Stewart (Quigg Partners); Poland–Gonzalo Rivera (Garrigues); Russia–Anna Amosova and Vassily Rudomino (Alrud) Yevgenya Muchnik (Squire, Sanders & Dempsey); Spain–Gonzalo Rivera (Garrigues); Sweden–Carl Westerberg and Leo Lee (Gernandt & Danielsson); Switzerland-Florian S. Jörg (Bratschi); Turkey–Fulya Kazbay (Brisel Law Offices); United Kingdom–Trevor Ingle (Hammonds) and

I. Argentina*

A. M&A and JV Activity in 2010

The Argentine M&A market has shown a strong correlation with the trend existing in international markets. Compared to the first part of 2009, total investments in transactions in the first part of 2010 increased by eighty percent,[2] and the total number of transactions grew from ten to eighteen, divided fairly evenly between large, medium, and small-scale transactions. This shows that trust is returning and that mergers are beginning to flow again, although there are still signs of difficulty in obtaining credit.

Unlike what had been happening until relatively recently, mergers and acquisitions in the country were led by Argentine companies or affiliates of foreign groups that already had a long-established corporation (*sociedad anónima*) registered in Argentina. Fifty-five percent of all transactions were carried out by local groups, largely involving small or mid-size targets. International investors, focusing on larger targets, led the largest transactions. Most transactions by both groups took place in the following sectors: financial services, manufacturing, energy, entertainment, and technology.

Among the most important investors in the country, it appears that the traditional investors (i.e. American or European companies) have changed the direction of their funds, focusing their attention on their own markets. This explains why new participants have acquired an important role in the region. Brazilian, Russian, Indian, and Chinese investors (such as the China National Offshore Oil Corporation) are now the ones who begin to stand out.

To summarize, developed countries are making the significant investments in the country, while local investors are oriented more towards mid-size or small targets.

B. Competition Clearance of Telefónica Acquisition

On October 14, 2010, Argentina's Competition Commission (CNDC) and Secretariat of Domestic Trade approved the Telefónica acquisition of an indirect stake in Telecom Italia, and through the latter in Telecom Argentina. Telecom Argentina is one of the two main telecommunications companies of Argentina, and a direct competitor of Telefónica's subsidiary in Argentina.

CNDC approved the transaction subject to the fulfillment of a detailed set of behavioral undertakings, mainly aimed at preventing Telefónica from influencing the businesses of Telecom Argentina and exchanging confidential information. This approval is surprising considering that the CNDC had been challenging the transaction for about three years.

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2. Jude Webber, *Argentine M&A Jumps, with a Little Help from the Brics*, Fin. Times, Sept. 29, 2010, http://blogs.ft.com/beyond-brics/2010/09/29/argentine-ma-jumps-with-a-little-help-from-the-brics.

II. Australia*

A. Schemes of Arrangement

On April 22, 2010, the Assistant Treasurer (finance minister) released draft legislation that will make it easier for takeovers and mergers regulated by the Corporations Act 2001 (Cth) (the "Act") to qualify for capital gains tax scrip for scrip rollover relief.[3] Scrip for scrip rollover allows investors who exchange shares in one company for shares in another to defer the realization of any capital gains from that trade. If such draft legislation is implemented, schemes of arrangement or takeovers made pursuant to Chapter 6 of the Act where the offer consideration includes bidder scrip may become more attractive.

B. Regulation of Foreign Investment

Foreign investment is regulated in Australia under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the "FATA"), which gives the Australian Treasurer the power to prohibit proposed foreign investments in Australian companies and assets that are contrary to the national interest.

On February 12, 2010, the reach of the FATA was extended so that transactions that result in foreign investors gaining, whether now or in the future, influence or control over an Australian company are subject to Australia's foreign investment rules.[4] The amendments, which operate retrospectively from February 12, 2009, will mean that foreign investment transactions by way of options to take up unissued shares, convertible notes, and other more sophisticated financing instruments or structures giving overseas financiers potential "equity upside" or voting power will be subject to the Treasurer's powers to assess, impose conditions on, and prohibit such transactions.

On June 30, 2010, the Australian government published its revised foreign investment policy[5] to clarify the rules that will be applied when reviewing investment proposals by foreign investors, especially those from foreign governments and their related entities, in the face of significant foreign investment, particularly in the Australian resources sector, by Chinese state-owned enterprises.[6] The policy identifies a number of investment pro-

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3. Press Release No. 070, Senator Nick Sherry, Assistant Treasurer, Australian Treasury, Release of Draft Legislation to Widen the Scope of the Script for Script Rollover Relief (Apr. 22, 2010), *available at* http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/070.htm&pageID=003&min=njsa&Year=&DocType=0.

4. *See* Press Release No. 017, Wayne Swan, Deputy Prime Minister and Treasurer, Australian Treasury, Amendments to Foreign Acquisitions and Takeovers Act (Feb. 12, 2009), *available at* http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/017.htm&pageID=%20003&min=wms&Year=&DocType=; *Chapter 3: Overview of the Foreign Acquisitions and Takeovers Act 1975*, Foreign Inv. Rev. Bd. (Austl.), http://www.firb.gov.au/content/Publications/AnnualReports/2008-2009/Chapter3.asp (last visited Mar. 10, 2011).

5. *See Foreign Investment Policy*, Foreign Inv. Rev. Bd. (Austl.), (Jan. 2011), http://www.firb.gov.au/content/_downloads/Australia%27s_Foreign_Investment_Policy_Jan_2011.pdf.

6. The year 2010 saw a continuation of the increase in 2009 of outbound investments by Chinese state-owned entities in the resources sector; for example, Royal Dutch Shell and PetroChina completed the acquisition of Arrow Energy. *See, e.g.*, James Paton, *Shell, PetroChina $3.1 Billion Takeover Approved by Arrow*

posals that the Australian Government needs to be notified of even if the FATA does not appear to apply.

C. Takeovers Panel Provides Guidance

In *Ross Human Directions*,[7] the Australian Takeovers Panel provided guidance on how deal protection measures for an agreed takeover bid or scheme of arrangement (such as no-shop, no-talk, and no-due diligence restrictions, as well as notification obligations, matching rights, and break fees) should be structured so as to ensure that they do not have an unacceptable effect on control of the target company. The decision is important for the negotiation of the terms of implementation agreements for change of control transactions for companies listed on the Australian Securities Exchange.

III. Austria*

A. Ruling on Competition Prohibition

Pursuant to Section 24 of the Austrian Act on Limited Liability Companies, managing directors are, without the consent of the company, neither entitled to conduct business in the same branch as the company nor to be a personally liable shareholder or a managing director or member of the supervisory board of a company with the same business objective. The purpose of this provision is to avoid conflicts of interest as well as the use of insider information. Section 24 is part of the duty of loyalty that managing directors owe to the company. The competition prohibition encompasses the business activities actually undertaken by the company and not any broader scope of business as may be set out in the articles of association of the company. If a managing director intends to conduct business which would otherwise run counter to the prohibition to compete he can either obtain the explicit consent of the company, obtain permission in the articles of association, or notify the company of his activities, which will be deemed allowed if the company after such notification does not prohibit such activities.

On April 21, 2010, the Austrian Supreme Court held that claims against a managing director of a limited liability company resulting from unlawful competitive activity may only be raised by the company itself and not by individual shareholders.[8] This ruling is relevant for joint venture companies in the form of Austrian limited liability companies. In joint venture settings certain joint venture partners often have the right to nominate managing directors of the joint venture company. Thus, it is possible that one shareholder holding a majority of the voting rights is entitled to appoint a managing director, who then violates the prohibition to compete. The nominating shareholder may decide

Energy Holders, Bloomberg, July 14, 2010, http://www.bloomberg.com/news/2010-07-13/arrow-energy-says-china-s-ndrc-has-approved-shell-petrochina-takeover-bid.html.

7. *Ross Human Directions Ltd.* (2010) A.T.P. 8 (Austl.). The Takeovers Panel acts as the main forum for resolving disputes about takeover bids until the relevant bid period has ended.

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8. Oberster Gerichtshof [OGH] [Supreme Court] Apr. 21, 2010, docket No. 7Ob23/10y, at Bundeskanzleramt Rechtsinformationssystem [BKA/RIS], document No. JJT/20100421/OGH0002/007OB00023/10Y0000/000, *available at* http://www.ris.bka.gv.at. (Austria).

not to support the motion of the other joint venture partners to claim damages from such managing director. Since the ruling of the Austrian Supreme Court makes clear that only the company and not individual shareholders can raise such claims, the other shareholders would be prevented from claiming damages from the respective managing director. This makes it all the more important to provide in the joint venture agreement that a shareholder with a nomination right is obliged to hold the other shareholders harmless from any damages resulting from its managing director's violation of the prohibition to compete.

IV. Denmark*

A. New Danish Companies Act

A new Danish Companies Act ("the Act") adopted in June 2009 came partially into force on March 1, 2010.[9] In general, the Act entails a liberalization of the rules regarding Danish public and private limited liability companies and offers some flexibility and certain advantages for M&A transaction structures. The former ten percent cap on own shares has been discarded, and the acquisition of own shares offers a simple way of assisting the buyer in the financing of the acquisition of a target company.

The Act also introduces an exemption from the general rule that a target company may not, directly or indirectly, advance funds, make loans, or provide security with a view to a third party's acquisition of the target company's shares, or shares in its parent company. It now will be possible for a target company to assist the buyer in financing the acquisition, subject to the fulfillment of certain cumulative conditions. For the exemption to apply, a general meeting of the target company must approve any such financial assistance and the target company's central governing body must ensure that any third party receiving financial assistance is credit-rated. Further, the total financial assistance granted by a target company to third parties must (i) at no time exceed what is reasonable in regard to the target company's/group's financial position; (ii) not exceed an amount equal to funds that can be distributed as dividends (i.e. the freely distributable reserves); and (iii) be provided at arm's length. Given these quite restrictive requirements, the new rules may not facilitate the most preferable method of having the target company assist in the financing of the acquisition of its own shares. It is foreseeable that general meeting approval for the financial assistance may be burdensome to obtain. Also, the monetary restrictions could mean that the parties to the transaction decide to have the target company acquire its own shares, distribute dividends, or reduce its share capital instead of relying on the statutory exemption. The Act also introduces the right to issue non-voting shares, which may become a common feature of financing structures.

Finally, the Act now stipulates that shareholders' agreements are not binding for a target company (or any other company) or its general meeting. Accordingly, resolutions adopted at a general meeting of a target company, which are in compliance with the target

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9. Lov om Aktie-og Anpartsselskaber (Selskabsloven) [Danish Act on Public and Private Limited Companies (the Danish Companies Act)], Chapter 1, *available at* http://www.dcca.dk/graphics/_ny%20eogs/English%20version/Legislation/The%20Danish%20Companies%20Act%20-%2006122010.pdf.

company's articles of association but not with a shareholders' agreement regarding the target company, will be deemed valid and binding from a company law perspective. Shareholders' agreements remain binding *inter partes* between those shareholders who are parties to it. This creates certain problems with the enforceability of shareholders' agreements, which the parties should address. One way to ensure enforceability of the terms of a shareholders' agreement, including its provisions on governance structure, right of first refusal, etc., is to incorporate the terms of the shareholders' agreement into the target company's articles of association. However, such action will also result in the terms of the shareholders' agreement becoming publicly available.

V. Germany*

A. Developments in Public Takeover Bids

Generally speaking, there are three alternative approaches to obtaining board representation and management control in German listed companies: (i) the traditional approach of a public tender offer at a premium price aimed at acquiring a large shareholding followed by the squeeze-out of minority shareholders, (ii) the more recent trend of "creeping in" by means of a public tender offer at the statutory minimum price in order to acquire a shareholding in the target just above the mandatory bid threshold (i.e. thirty percent of the voting rights), and (iii) the "cold takeover," where a combination of a shareholding just below the mandatory bid threshold and activist behaviour can prepare the grounds for obtaining management control.[10] Recent developments with two of these approaches, the traditional approach and the "creeping in" approach, are discussed below.

1. *Premium Price Tender Offers and the Squeeze-out of Minority Shareholders*

The strategy of a premium price tender offer aimed at acquiring a shareholding as large as possible and the subsequent squeeze-out of minority shareholders may become easier to implement due to new legislation and case law. Four years of experience with the procedure for the squeeze-out of minority shareholders following a voluntary or mandatory public tender offer has shown that this procedure can be used successfully to obtain 100% ownership.[11] The procedure requires the bidder to make a filing with the Frankfurt District Court within three months following the end of the acceptance period. The filing

* This section was authored by Dr. Hartmut Krause, Partner, Allen & Overy LLP, Frankfurt, Germany.

10. *See, e.g.*, Mike Gavin, *Kuka Major Shareholder Grenzebach Buys Shares from Investor Wyser-Pratte*, BLOOMBERG, Sept. 28, 2010, http://www.bloomberg.com/news/2010-09-28/kuka-major-shareholder-grenzebach-buys-shares-from-investor-wyser-pratte.html (showing the "cold takeover" of KUKA by Grenzebach); *see, e.g.*, Werner Sperber, *Augusta Technologie Schlägt Wieder Zu* [Augusta Technology Strikes Again], DERAKTIONAER ONLINE (Ger.), Jan. 26, 2011, http://www.deraktionaer.de/aktien-deutschland/augusta-technologie-schlaegt-wieder-zu-14178239.htm (showing the "cold takeover" of Augusta Technologies by an "ad hoc" consortium of Lincoln Vale and the Hopp family office); *see generally* Hartmut Krause, *Die "kalte Übernahme"* [The "Cold Takeover"], *in* FESTSCHRIFT FUR UWE H. SCHNEIDER [In Honor of Uwe H. Schneider] 669, 669 (Ulrich Burgard et al., eds., 2011).

11. *See, e.g.*, Oberlandsegericht Frankfurt [OLG Frankfurt] [Frankfurt Provincial Court of Appeal] Dec. 9, 2008, WpÜG 2/08 (Ger.); Landgericht Frankfurt [LG Frankfurt] [Frankfurt District Court] Mar. 13, 2009, 3-5 O 328/08 (Ger.); Landgericht Frankfurt [LG Frankfurt] [Frankfurt District Court] Aug. 2, 2007, 3-5 O 138/07 (Ger.).

can only be made if the bidder holds, or will hold pursuant to the offer, ninety-five percent of the voting share capital of the target company. If ninety percent of the target's voting share capital has accepted the offer, the consideration owed under the squeeze-out will be equal to the per-share consideration paid under the public offer.

New legislation is expected to be implemented that will make it easier for bidders to squeeze out minority shareholders pursuant to the squeeze-out procedure outside of the context of a public tender offer. This procedure requires a shareholding of ninety-five percent, an audit of the consideration by a court-appointed firm of chartered accountants, a shareholder vote, and registration in the commercial register. This procedure has traditionally been challenging for bidders because minority shareholders enjoy strong protection under German law: very small shareholders can challenge the shareholder resolution in court, thereby bringing the squeeze-out to a halt. Defendant companies are able to overcome the standstill and consummate the squeeze-out despite the pending litigation provided that, upon special motion, the court rules that the shareholder lawsuit is obviously without merit or that the disadvantages for the defendant company resulting from the standstill outweigh the disadvantages for the shareholder plaintiffs. Since July 2009, the court must also rule in favour of the defendant company if the plaintiff cannot prove within one week after service of the defendant company's motion that it has held at least €1,000 of the nominal share capital since the announcement of the shareholder meeting. Given the relatively large number of squeeze-outs registered during the year 2010, this new rule seems to have cut back excessive minority shareholder rights efficiently. Prospective bidders may be relieved to hear this.

A decision handed down by the Bundesgerichtshof [BGH] [Federal Supreme Court] on July 19, 2010 provides more good news for prospective bidders.[12] Under German law, minority shareholders can challenge the adequacy of the squeeze-out consideration in appraisal proceedings, which, if successful, will result in the bidder owing a higher per-share consideration. The per-share consideration must be "adequate," which is the case if such consideration at least equals the higher of (i) the per-share discounted earnings or discounted cash flow value of the defendant company or (ii) the weighted average stock exchange price during the three-month period preceding the general meeting. This decision was criticized by practitioners because the notice period of the shareholder meeting (i.e. thirty days plus a registration period of up to six days) was part of the three-month period, so shareholders who were aware of the upcoming shareholder vote had the opportunity to drive up the stock exchange price and thereby drive up the consideration payable under the squeeze-out procedure. In the decision of July 19, 2010, the Federal Supreme Court held that in general the three-month reference period for the calculation of the volume-weighted average stock exchange price shall start at the public announcement of the transaction. As a result, bidders can better predict the total consideration payable in the squeeze-out procedure.

Finally, in the future the squeeze-out of minority shareholders may, under certain circumstances, already begin if the bidder only holds ninety percent of the share capital of the target company. On July 7, 2010, the German government adopted a draft bill allowing a squeeze-out of minority shareholders in the context of an upstream-merger

12. Bundesgerichtshof [BGH] [Federal Court of Justice] July 19, 2010, II ZB 18/09 (Ger.).

where the majority shareholder holds ninety percent of the share capital of the subsidiary. It is expected that the new legislation will take effect in the first half of 2011.

2. *Public Tender Offer at the Minimum Price ("Creeping In")*

The strategy of a no-premium tender offer aimed at acquiring a shareholding just above the mandatory bid threshold (i.e. thirty percent of the voting rights) is quite a new phenomenon in Germany. Porsche used it for its mandatory bid for Volkswagen in 2007. Deutsche Bank applied it when bidding for Deutsche Postbank in October 2010. ACS of Spain also used this tactic in its hostile exchange offer for Hochtief. German law provides for only *one* mandatory bid threshold. Because there are no further mandatory bid triggers between, for instance, thirty percent and fifty percent like in the United Kingdom or France, bidders holding more than the thirty percent threshold following a voluntary or mandatory takeover offer that complies with the German pricing rules[13] are free to purchase additional shares without triggering a second mandatory bid. The ACS bid for Hochtief prompted German politicians to request amendments to the Takeover Act to insert extra mandatory bid triggers for bidders holding between thirty percent and fifty percent, but this was rejected in the *Bundesrat* chamber of the German Federal Parliament. Furthermore, the German federal government decided to abstain from interfering with the ACS bid. Germany thus did not retaliate against Spain for Spain's last minute legislation blocking Germany's energy supplier EON from taking control of Spanish Endesa in 2006-07.

VI. India*

A. Right of First Refusal Clauses Considered by Indian Courts

"Right of first refusal" ("ROFR") clauses are present in almost all joint venture investment agreements involving public companies in India. These clauses oblige one of the investors to offer his shares to the others in the event the first investor desires to sell his shareholdings. That said, the legality of this clause is ambiguous when it comes to public companies, notwithstanding their widespread use. The cloud of uncertainty arises from Section 111A of the Companies Act, 1956 ("Section 111A"), which provides that the shares of a public limited company shall be "freely transferable."

Two cases in 2010 considered the legality of ROFR clauses involving shares of public companies and the meaning of the term "freely transferable." First, in *Western Maharashtra Development v. Bajaj Auto* (the "Bajaj Auto Case"), a single judge of the Bombay High Court (the "Court") struck down ROFR clauses as they relate to public companies.[14] The Court was of the view that any restriction on the free transferability of shares, even if

13. The offer price must be equal or higher than the higher of (i) the three-month volume-weighted average stock exchange price or (ii) the best price paid by the bidder during the six-month period preceding the offer. WpÜG-Angebotsverordnung [WpÜGAngebV] [Offer Regulations of the Securities Acquisition and Takeover Act], Dec. 27, 2001, BGBl. I at 4263, §§ 3-6 (GER.); Wertpapiererwerbs-und Übernahmegestez-WpÜG [German Securities Act], Apr. 22, 2002, BGBl. I at 3822, § 31(1) (GER.).

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14. *See* W. Maharashtra Dev. Corp. v. Bajaj Auto Ltd., (2010) 154 Comp Cases 593 (Bom) (India).

stipulated between certain shareholders only, is a clear violation of the provisions of Section 111A. The Court stated that "the free transferability of shares in a public Company is founded on the principle that members of the public must have the freedom to purchase and, every shareholder, the freedom to transfer."[15] The Court held that the expression "freely transferable" is wide enough to even restrict the shareholders from themselves putting any fetters on their right to freely transfer the shares. This decision is now under appeal.

In *Messer Holdings v. Shyam Madanmohan Ruia* (the "Messer Holdings Case"), a division bench of the Bombay High Court disagreed with the decision of the single judge in the Bajaj Auto Case and gave legal sanction to the use of ROFR clauses for public company shares.[16] The Court examined the legislative intent behind the enactment of Section 111A and held that the purpose of Section 111A was to prevent a public company's board of directors from refusing registration of shares in the name of the transferee. The Court held that though the expression "freely transferable" has to be given the broadest meaning, it cannot be construed in such a manner so as to take away the right of shareholders to enter into private arrangements to exercise their ownership rights, which includes a right to give away the power to transfer the shares under certain circumstances. But, the Court also held that a company can restrict shareholders from enforcing ROFR clauses by expressly including such a condition in its articles of association.

The division bench judgment in the Messer Holdings Case seems to be consistent with the legislative history of Section 111A, but the dispute over the meaning of this provision is not over. An appeal against the decision of the division bench in the Messer Holdings Case has already been filed with the Indian Supreme Court.

B. The Vodaphone Tax Controversy

The practice of "bedding and breakfasting" Indian acquisitions in tax havens through the transfer of upstream shell holding companies incorporated in tax havens needs to be reconsidered in light of the recent Vodafone tax controversy.

Vodafone Holdings ("VH") Hong Kong acquired a controlling stake in Hutchinson Essar Ltd. ("HEL") by acquiring shares of CGP Investment ("CGP") Cayman Islands, the ultimate holding company of HEL, from Hutchinson Telecommunication International ("HTI"). The Indian Tax authorities ("Indian IT") issued a notice to VH for failure to effect Withholding Tax ("WHT") for capital gains tax on the consideration paid by VH to HTI. Indian IT contended that the consideration paid was in reality for the indirect transfer by HTI of its controlling stake in HEL, rather than the shares of CGP.

Vodafone sought to challenge the India IT notice by filing a writ petition before the Bombay High Court. The Bombay High Court, though not ruling directly on the taxability of transfer of the CGP shares by HEL to VH, held that such a transfer resulted in a transfer of the rights and entitlements of HEL's Indian business, including brands and intangibles, and also constituted a control premium and compensation for a non-compete agreement. All these constituted a "capital asset" within the meaning of the Income Tax Act 1961 ("Act") and hence HEL was liable to tax on their transfer; as a consequence, VH

15. *Id.* at *53.

16. Messer Holdings Ltd. v. Shyam Madanmohan Ruia, (2010) 159 Comp Cas 29, 31 (Bom) (India).

was obliged to deduct WHT on the amount paid to HEL. Because Vodafone had failed to do so, it was liable as an assessee in default under the Act. The Indian IT subsequently issued a demand notice to VH for depositing the WHT with interest (assessing the entire consideration as taxable in India in the hands of HEL). VH appealed to the Supreme Court of India and also requested a stay of the Bombay High Court's ruling. The appeal has been admitted but no stay was granted.

Irrespective of how the appeal is decided, the new Direct Taxes Code Bill 2010 proposes to tax such transfers by mandating that all income from the transfer of capital assets situated in India, whether effected directly or indirectly, will be liable to tax in India. It also further elaborates that any transfer of shares or interest in a foreign company which has underlying Indian assets, owned directly or indirectly, will also be liable to tax in India, based on fair market value to the extent of fifty percent or more in the preceding twelve months before such transfer.

VII. Israel*

A. Proposed New Sanctions Would Increase Exposure of Officers and Directors for Securities Violations

One of the more important developments in Israeli corporate law over the past year was the introduction of the Bill for Efficient Enforcement Procedures (the "Bill") in the Israeli Securities Authority ("ISA").[17] If the Bill is enacted, a new enforcement committee[18] will be established under the aegis of the ISA with the authority to impose administrative sanctions without the judicial process required for criminal proceedings. The Bill will increase the exposure of directors and officers of Israeli companies to financial and other sanctions and will, in particular, broaden the exposure of chief executive officers of companies defined as "reporting companies" under Israeli law (generally, companies whose equity or debt is publicly held). The increased exposure to sanctions resulting from the Bill may be a relevant consideration for Israeli and foreign individuals who wish to take management and board level positions in Israeli companies.

This increased exposure results from both the elimination of the burden on the ISA in criminal proceedings to prove that the offender was aware of all the elements of the crime, and the high maximum amounts for fines that may be imposed on individuals in the new administrative proceedings (up to NIS five million for "severe" offenses). The Bill will

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17. The Bill passed an initial reading in the Israeli parliament (the Knesset), was approved by the Knesset Finance Committee, and has been returned to the Knesset for its second and third readings. In the absence of significant opposition, the Bill, as amended by the Finance Committee, is expected to become law. The final version of the Bill was not available at the time this article was written.

18. The Bill proposes a committee with six members: two ISA appointees and four appointees of the Minister of Justice. Two members are to have expertise in capital markets and two in securities and corporate law. The committee will sit in panels composed of three members: one ISA appointee, one capital markets expert, and one legal expert.

prohibit companies and their controlling shareholders from indemnifying or insuring directors and officers for liability for administrative fines.[19]

The enforcement committee may also (i) require that compensation be paid to victims of the administrative offense up to the maximum amount of the permissible fine; (ii) bar individuals from serving as "senior office holders" in various types of companies with responsibility for the public's funds, including reporting companies, for up to five years for "severe" administrative offenses; or (iii) suspend an individual's license to provide investment advice or manage portfolios if the committee determines that the offender has committed a "medium" or "severe" administrative offense. The bar on serving as a senior office holder is a particularly significant sanction as it may prevent an individual from being able to obtain appropriate employment.[20]

A chief executive officer's exposure is further increased under the new concept of "supervisory liability" introduced by the Bill. Under this concept, the chief executive officer has a duty to supervise his company's activities and take all necessary measures to ensure that employees of the company do not breach Israeli securities law. If the securities laws are breached, there is a presumption that the chief executive officer breached this duty and he may be subject to a financial sanction and be barred from serving as a senior office holder for certain periods of time. However, the chief executive officer is presumed to have fulfilled his duty to supervise if the company establishes sufficient procedures and conducts employee-training sessions to prevent such breaches. Supervisory liability can be imposed on a chief executive officer for an administrative offense even without any personal involvement by the chief executive officer in the commission of the offense.

The main criticism of the Bill that has been voiced to date is the scope of power the Bill affords the ISA. Under the Bill, the ISA investigates suspected administrative offenses, prosecutes alleged offenders, and judges them. Thus, an agency subject to limited judicial review will have broad discretion to impose fines and penalties, which hitherto had been subject to proceedings before a judicial body, rather than the agency charged with enforcing the securities laws. While the Finance Committee considered restricting the ISA's discretion in this regard, it appears likely that the final version of the Bill will grant the ISA extensive powers to impose heavy penalties without providing defendants with the protections of a judicial process. Thus, the enactment of the Bill should be a significant consideration for individuals who may wish to take management positions and board seats in Israeli companies.

VIII. New Zealand*

A. Review of the Overseas Investment Act 2005

Under current New Zealand law, international mergers, acquisitions, or joint ventures may require consent from the New Zealand Overseas Investment Office in certain circumstances where there is a New Zealand business operated by the "target." This can

19. The current version of the Bill permits indemnification and insurance for expenses incurred in the course of the administrative proceeding, including attorneys' fees.

20. The definition of "senior office holder" is broad and includes service as a director, chief executive officer, officers reporting to the chief executive officer, controller, and internal auditor.

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have an impact on the timing of transactions, as consent applications can take some time to be processed.

Overseas investment remains a sensitive topic in New Zealand. For example, because agriculture, and in particular, the dairy sector, is such a key element of New Zealand's economy, there is a degree of public sentiment that sales of such farms to overseas interests is "selling off the family silver."[21]

In March 2009, the new national government announced a review of the overseas investment rules. The review aimed to make foreign investment in New Zealand simpler and more attractive, while at the same time protecting sensitive land, assets, and resources. In July 2009, greater decision-making powers were delegated to the Overseas Investment Office, meaning that all decisions apart from those relating to rural sensitive land, or land adjoining waterways, can now be made without reference to the Minister of Finance. We have yet to see any practical effect from this change in terms of the time taken to process applications.

On September 27, 2010, the Minister of Finance announced that though the government would not seek to amend the Overseas Investment Act itself, it would make several changes to the regulations outside the Act, including:[22]

- "Two new measures under the benefit test used to assess investments in sensitive land: [including] [a] new 'economic interests' factor allowing [the relevant] ministers to consider whether New Zealand's economic interests are adequately safeguarded and promoted" and
- "[M]ore clarity about the Government's policy on overseas investment in sensitive assets," by way of a new ministerial directive letter to the Overseas Investment Office.

These changes are expected to take effect prospectively from December 2010.

B. Developments in the Law relating to Joint Ventures

In 2006, in the Supreme Court case of *Chirnside v. Fay*, the Chief Justice stated that "[w]here parties join together in a venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture and while it continues."[23] While essentially the inquiry as to whether a fiduciary relationship has arisen in particular circumstances is a factual one, the Supreme Court made it clear that a fiduciary duty could arise despite the absence of an express undertaking or agreement to act in the best interests of another.

In *Gibson v. Curtis*,[24] the High Court considered the application of *Chirnside v. Fay*, and, in particular, the imposition of fiduciary duties on parties to a joint venture. The Court held that because there was a degree of formality, both in terms of corporate structure and

21. Overseas investment in the dairy sector became an issue of increased public scrutiny in 2010 because of a proposal by Chinese interests to purchase a number of very large dairy holdings. The matter is still ongoing.

22. Press Release, Rt. Hon. Bill English, Minister of Finance, N.Z., New Investment Rules Strike the Right Balance (Sept. 27, 2010), *available at* http://www.beehive.govt.nz/release/new-investment-rules-strike-right-balance.

23. Chirnside v. Fay (2006) NZSC 68 (SC) (N.Z.).

24. Gibson v. Curtis, [2010] N.Z.H.C. 845 (N.Z.).

legal documentation, it was unlikely that there was a separate joint venture that gave rise to a fiduciary relationship between the parties. The Court went on to say that if there was such a joint venture, there was no breach of fiduciary duty established on the facts. In reaching its decision, the Court relied on *Amaltal Corporation v. Maruha Corporation*, where the Supreme Court ruled that where the parties chose a corporate structure, it was unlikely that their relationship as a whole would be fiduciary in nature.[25]

IX. United Kingdom*

A. Changes to U.K. Takeover Code

Important changes to the U.K. Takeover Code, the U.K. regulation governing mergers and acquisitions of public companies, have been implemented in relation to the public disclosures required to be made in the period during which a target company is subject to a possible offer. These changes require an even greater level of transparency in relation to both the holding of and dealing in interests in the shares of the target and, in certain circumstances, bidder companies. These include holders of interests of one percent or more, wherever such shareholders are based. Ensuring that shareholders outside the United Kingdom are aware of such disclosure requirements sometimes remains problematic.

In October 2010, the Takeover Panel, the U.K. regulator for takeovers and mergers, also published proposed reforms to the Takeover Code to deal with concerns, expressed by some, that the U.K. takeover regime is too favorable to hostile bidders and allows short-term investors an undue level of influence in relation to takeovers of U.K. companies. These concerns were highlighted primarily by the takeover of Cadbury PLC by Kraft Food Inc., where long-established U.K. manufacturing facilities were closed after the takeover.

The proposed changes seek to rebalance the position in favor of target companies, improve the offer process, and take more account of people, other than the target's shareholders, who are affected by a takeover (*e.g.* a target company's employees). The proposed changes include: (a) restricting the period to four weeks during which a target company could be subject to unwanted siege by an unsolicited bidder; (b) prohibiting, except in certain limited circumstances, the ability of a bidder to require or a target to concede break fees, non-solicitation/exclusivity undertakings, or other deal protections which, following the North American model, have become increasingly popular and, on occasion, standard over recent years; (c) requiring public disclosure of the fees charged by advisers on transactions, on an individual adviser basis; (d) requiring greater disclosure of the financing of the enlarged group post-takeover; and (e) requiring greater and more specific disclosure of the effects of a bid on the employees of the combined group and requiring more effective communication with target employees or their representatives during the bid process.

The proposed amendments should be the subject of further detailed amendments. If adopted, they could mark a considerable change to the existing regime.

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25. *See* Amaltal Corp. v. Maruha Corp., (2007) 3 NZLR 192 (SC) (N.Z.).

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B. Changes to Corporate Governance Rules

As a separate development, principal changes in the area of corporate governance include: (a) the publication in May 2010 by the Financial Reporting Council ("FRC") of the new U.K. Corporate Governance Code (the "New Code"); and (b) the publication in July 2010 by the FRC of the new U.K. Stewardship Code for institutional investors which the FRC regards as complementary to the New Code. The New Code will apply to all companies, whether incorporated in the United Kingdom or elsewhere, which have a "Premium" listing of equity shares (see further below) in respect to financial years beginning on or after June 29, 2010. The New Code replaces the 2008 Combined Code on Corporate Governance.

Changes made by the New Code include the following: (a) that all directors of FTSE 350 companies should stand for reelection each year (this has been particularly controversial); (b) that FTSE 350 companies should have their board effectiveness reviews facilitated externally at least every three years; and (c) that a company's chairman should regularly review and agree with each director as to their individual training and development needs.

The Stewardship Code sets out good practices on engagement with companies in which institutional investors make investments. The FRC believes institutional investors should aspire to such practices. Like the New Code, the Stewardship Code operates on a "comply or explain" basis. This tightening of corporate governance regulation may also start to trickle down to smaller quoted companies within the United Kingdom, in some form or other, even if such companies are not formally required to comply with the above provisions.

X. United States*

A. Poison Pills

In a highly anticipated decision, the Delaware Supreme Court affirmed a Chancery Court decision holding that a target board's adoption of a low-threshold net operating loss (NOL) poison pill was reasonable to protect NOLs.[26] Under U.S. tax law, NOLs may be used to reduce future income taxes, but may become impaired if there is a change in control (as specially defined for tax purposes). Although traditional poison pills are often triggered by the acquisition of fifteen percent or more of a corporation, a NOL poison pill will generally be triggered by the acquisition of five percent or less of a corporation.

In this case, the target company, Selectica, adopted a NOL poison pill at a time when its competitor, Trilogy, was pursuing a hostile acquisition. Trilogy elected to "buy through" the pill, triggering the rights under the plan, and subsequently argued that the pill's 4.99% threshold was invalid under Delaware law. In its decision, the Chancery

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26. Selectica, Inc. v. Versata Enter., Inc., No. 4241-VCN, 2010 WL 703062, *24 (Del. Ch. Feb. 26, 2010), *aff'd*, 5 A.3d 586 (Del. 2010). A poison pill is formally known as a "shareholder rights plan" and operates to thwart takeover attempts by diluting the stock holdings of unwanted acquirers.

Court confirmed that poison pills are generally permissible under Delaware law, and held that the decision to adopt a NOL poison pill by the Board of Directors of Selectica was entitled to deference under the "business judgment rule" because the Board reasonably believed that the NOLs were a valuable corporate asset and Trilogy's actions posed a serious impairment threat.

The Delaware Supreme Court affirmed, but was careful to state that "[t]he fact that the NOL Poison Pill was reasonable under the specific facts and circumstances of this case, should not be construed as generally approving the reasonableness of a 4.99% trigger in the Rights Plan of a corporation with or without NOLs."[27] Therefore, we can conclude that the validity of poison pills will continue to be determined on a case-by-case basis.[28]

B. Taxes

There have been significant changes in U.S. tax laws during 2010, many of which affect U.S. enterprises with foreign operations. Furthermore, as of the date of this writing, U.S. income taxes are scheduled to increase significantly in 2011 and the U.S. Congress continues to consider legislation that would further increase income taxes on the carried interest received by many private equity and venture capital fund managers. These developments may lead to a surge in year-end deal flow for 2010. Depending on the resolution of open issues in the U.S. Congress in the coming months, these developments may also indicate a slow-down in deal flow for 2011, especially in cross-border mergers and acquisitions involving U.S. acquirers, as well as private equity/venture capital exit transactions.

27. Versata Enter., Inc v. Selectica, Inc., 5 A.3d 586, 607 (Del. 2010), *aff'g* Selectica, Inc. v. Versata Enter., Inc., No. 4241-VCN, 2010 WL 703062 (Del.Ch. Feb. 26, 2010).

28. *See* Steven M. Davidoff, *Delaware Broadens Standards for Poison Pills*, N.Y. Times, Mar. 2, 2010, http://dealbook.blogs.nytimes.com/2010/03/02/delaware-broadens-standards-for-poison-pills/; Allen Calhoun, *Versata v. Selectica: Green Light for NOL Poison Pills But With A Shift In Logic?*, BNA Federal Tax Blogs, Oct. 12, 2010, http://www.bnatax.com/blogsdetail.aspx?id=2147485424&.