

## INTERNATIONAL M&A AND JOINT VENTURES

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This article summarizes important legal developments in 2015 in international mergers and acquisitions and joint ventures.

### I. ARGENTINA

The most relevant legal development in the corporate and M&A field in Argentina is the new Civil and Commercial Code effective August 1, 2015 (the “Code”).<sup>1</sup> One of the main amendments introduced by the Code is the single-member corporation.<sup>2</sup> This type of corporate entity removes the requirement of multiple-membership companies, which was one of the essential characteristics of a corporation under the previous legislation.

Regarding corporate transformation, mergers, and spin-offs, the Code authorizes the reorganization of companies and requires the unanimous consent of all members of the legal entity or entities involved, except if otherwise provided in the by-laws.<sup>3</sup> The Code expressly accepts corporate mergers, particularly through absorption and business combination. A corporate merger entails the dissolution of the absorbed entity or the

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1. Law No. 26994, Cod. Civ. Y Com. (2014) (Arg.).

2. *Id.* annex II, art. 2.2.

3. *Id.* annex II, art. 2.12.

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merging legal entities. In relation to spin-offs, it stipulates that the divided legal entity shall be dissolved.

In terms of corporate law, the Code standardizes provisions regarding a corporation's legal capacity, the handling of government, administration and social control, conflicts of interest, and personal liability of company's directors.

The Argentine M&A market has shown a strong correlation with the trend in the international markets. If the market's development is analyzed in terms of amounts, Argentina maintained a clear downward trend since 2010, although it showed a slight recovery in 2014.<sup>4</sup> But if evaluated in quantitative terms, in the last two years the trend has been upward and current M&A levels are similar to those of 2012.<sup>5</sup>

The sectors with the greatest potential for investment are oil & gas, mining, farming and agriculture, and the services industry, including food & beverages. Domestic and foreign investors are expected to focus on these areas for their operations in the future. Latin America is seen worldwide as strategic for the agribusiness sector: thirty percent and sixty percent of the agribusiness exports of this region are, respectively, beef and soybeans.<sup>6</sup> In recent months, fifty percent of the transactions conducted in Argentina were domestic, while the other half was cross-border, mainly involving investors from the United States, Canada, Europe, and Chile. The transactions conducted during the last year included the following:

- (1) The main multimedia group in Argentina, Grupo Clarín S.A., closed the acquisition of forty-nine percent of Nextel Communications Argentina S.A., a domestic mobile phone operator, for U.S. \$178 million. An option to purchase the remaining fifty-one percent was also concluded.<sup>7</sup>
- (2) Almacenes Éxito S.A., the Colombian supermarket chain controlled by the French group Casino, agreed to acquire one hundred percent of Supermercados Libertad S.A. for U.S. \$270 million.<sup>8</sup>

In the analysts' view, in a year of presidential election, investors are "lured" by the possible changes in the economic policies and are again becoming interested in Argentine companies. The 2015 Argentine presidential election has raised strong expectations of change, and already there are investors contemplating investments in local private companies in view of a fresh economic climate soon to materialize. The companies that

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4. See Francisco Galizia, *The elections 'wake up' the business of mergers and acquisitions in the country*, EL CRONISTA (May 7, 2015) available at <http://www.cronista.com/finanzasmercados/Las-elecciones-despiertan-el-negocio-de-las-fusiones-y-adquisiciones-en-el-pais-201507-0049.html>.

5. *Id.*

6. See *Las fusiones y adquisiciones de empresas en Argentina sumaron 410 millones de dolares en el primer semestre*, BAE (September 8, 2015) available at <http://www.diariobae.com/notas/95334-las-fusiones-y-adquisiciones-de-empresas-en-la-argentina-sumaron-410-millones-de-dolares-en-el-primer-semestre.html>.

7. See *Grupo Clarín ingresa a telefonía móvil*, DIARIO DE FUSIONES Y ADQUISICIONES (September 23, 2015) available at [http://www.diariodefusiones.com/?Grupo\\_Clarin\\_ingresa\\_a\\_telefonia\\_movil\\_con\\_la\\_compra\\_del\\_49%25\\_de\\_Nextel\\_Argentina\\_en\\_US\\_178\\_millones&page=ampliada&id=827&s=&\\_page=tags](http://www.diariodefusiones.com/?Grupo_Clarin_ingresa_a_telefonia_movil_con_la_compra_del_49%25_de_Nextel_Argentina_en_US_178_millones&page=ampliada&id=827&s=&_page=tags).

8. See *La cadena Almacenes Éxito de Colombia adquiere a Casino de Francia participaciones en Argentina*, DIARIO DE FUSIONES Y ADQUISICIONES (August 26, 2015) available at [http://www.diariodefusiones.com/?La\\_cadena\\_Almacenes\\_Exito\\_de\\_Colombia\\_adquiere\\_a\\_Casino\\_de\\_Francia\\_participaciones\\_en\\_Argentina\\_y\\_Brasil\\_por\\_US\\_1.800\\_millones&page=ampliada&id=821&s=&\\_page=tags](http://www.diariodefusiones.com/?La_cadena_Almacenes_Exito_de_Colombia_adquiere_a_Casino_de_Francia_participaciones_en_Argentina_y_Brasil_por_US_1.800_millones&page=ampliada&id=821&s=&_page=tags).

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can anticipate these changes and foresee growth sectors will be strategically well positioned.

## II. BRAZIL

According to the publication “2015 Index of Economic Freedom” issued by The Heritage Foundation, Brazil is ranked 118th in the category of “mostly unfree economies.”<sup>9</sup> An incredible development for the international market took place, however, with the enactment of Law No. 13,097 on January 19, 2015 (Law 13,097)<sup>10</sup>, which allows foreigners to invest in the Brazilian healthcare industry.

Paragraph 3 of article 199 of the Brazilian Federal Constitution<sup>11</sup> (the “Constitution”) forbids direct and indirect participation of foreign companies or capital in health assistance in the country, except in cases provided by law. Until Law 13,097, foreign investments were allowed only (a) through donations of international entities linked to the United Nations and entities engaged in technical cooperation, financing, and loans in accordance with Law No. 8,080, of September 19, 1990 (Law 8,080)<sup>12</sup>; (b) in family planning-oriented actions and research as provided for in Law No. 9,263 of January 12, 1996<sup>13</sup>; and (c) in private healthcare plan operators in accordance with Law No. 9,656 of June 3, 1998.<sup>14</sup>

Law 13,097 amended article 23 of Law 8,080 with the aim to allow the participation of foreign capital and investment by foreign companies in the Brazilian healthcare industry, without any restrictions in terms of control and without any prior approval from the Brazilian Ministry of Health, if such investments are in: (a) legal entities intended to set up, operate, or exploit hospitals, including charitable, specialty, polyclinic, general clinics, and expert clinic units; (b) non-profit healthcare services entities; and (c) companies’ healthcare services strictly for their employees and dependents.<sup>15</sup>

Law 13,097 also amended Law 8,080 by introducing article 53-A pursuant to which human genetic and pharmaceutical labs engaging in the production and supply of healthcare products and medicines, as well as clinical analysis, anatomic pathology, and imaging test labs are considered healthcare support activities and, consequently, will not be subject to the constitutional ban on foreign investments in the Brazilian healthcare industry.<sup>16</sup> The constitutionality of the new wording introduced to Law 8,080 has been challenged in the Brazilian Supreme Court (*Supremo Tribunal Federal*) (STF) by different associations and institutions, which argue that the possibility of allowing foreign investment is too broad considering the wording of the Constitution, and that amending the Constitution would be the only feasible and legal way to abolish the restrictions on foreign investments.

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9. See The Heritage Foundation, *2015 Index of Economic Freedom*, available at <http://www.heritage.org/index/>.

10. Law No. 13097/2015, DIÁRIO OFICIAL DA UNIÃO (January 20, 2015) (Braz.).

11. Constituição Federal [Brazilian Constitution], DIÁRIO OFICIAL DA UNIÃO (October 5, 1988) (Braz.).

12. Law No. 8080/1990, DIÁRIO OFICIAL DA UNIÃO (September 20, 1990) (Braz.).

13. Law No. 9263/1996, DIÁRIO OFICIAL DA UNIÃO (January 15, 1996) (Braz.).

14. Law No. 9656/1998, DIÁRIO OFICIAL DA UNIÃO (June 6, 1998) (Braz.).

15. Law No. 13097/2015, DIÁRIO OFICIAL DA UNIÃO (January 20, 2015) (Braz.), art. 142, *supra* note 10.

16. *Id.*

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Even though the issue will be the object of STF's scrutiny, a U.S. private equity fund, The Carlyle Group (Carlyle), already made two investments in the healthcare industry following the enactment of Law 13,097. In April 2015, Carlyle invested an equivalent of U.S. \$600 million in one of Brazil's largest hospital operators, Rede D'Or.<sup>17</sup> In August 2015, Carlyle furthermore acquired 100% of Tempo Assist, a BOVESPA-listed health care provider, through a tender offer of approximately U.S. \$193 million.<sup>18</sup> These transactions are an indication that international private equity funds are eager to identify opportunities in the Brazilian healthcare industry.

### III. CANADA

Effective on April 24, 2015, the Canadian government introduced changes to the Investment Canada Act (ICA) regulations<sup>19</sup> making it significantly easier for many transactions to escape a lengthy review process as to whether a foreign investment presents a "net benefit" to Canada. At the same time, the new regulations have increased the disclosure burden for the routine notifications required of all foreign investors in Canada and have lengthened the timelines for national security reviews.

Under the ICA, all acquisitions of control of Canadian businesses by non-Canadian investors are subject to either review (a burdensome and lengthy process, usually pre-closing) or notification (a more straightforward, largely administrative process). The review threshold has increased from C\$369 million to C\$600 million, for most investors.<sup>20</sup> The threshold will remain at C\$600 million for two years, then increase to C\$800 million for two years, and then to C\$1 billion (indexed annually to inflation) thereafter.<sup>21</sup>

The "net benefit" review threshold has also been changed from an *asset value* test to an *enterprise value* test.<sup>22</sup> The calculation of enterprise value depends on the structure of the acquisition:

- Acquisitions of shares of publicly-traded entities: enterprise value is equal to (market capitalization) + (liabilities) – (cash and cash equivalents).<sup>23</sup>
- Acquisitions of shares of non-publicly-traded businesses: enterprise value is equal to (acquisition value) + (liabilities) – (cash and cash equivalents).<sup>24</sup>
- Acquisitions of assets: enterprise value is equal to (acquisition value) + (assumed liabilities) – (cash and cash equivalents).<sup>25</sup>

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17. See Guillermo Parra-Bernal, *Carlyle to Pay \$600 mln for Brazil's Rede D'or Stake, Source Says*, REUTERS (April 27, 2015) available at <http://www.reuters.com/article/2015/04/27/rededor-ma-carlyle-idUSE5N0W001M20150427>.

18. See Press Release, *The Carlyle Group acquires a controlling stake in Temp Participações*, THE CARLYLE GROUP (November 9, 2015) available at <https://www.carlyle.com/news-room/news-release-archive/carlyle-group-acquires-controlling-stake-tempo-participações-largest->.

19. See *Regulations Amending the Investment Canada Regulations*, SOR/2015-64.

20. See the Regulatory Impact Analysis Statement to SOR/2015-64 available at <http://www.gazette.gc.ca/rp-pr/p2/2015-03-25/html/sor-dors64-eng.php>.

21. *Id.*

22. *Id.*

23. See *Regulations Amending the Investment Canada Regulations*, § 3.3, *supra* note 19.

24. *Id.* § 3.4.

25. *Id.* § 3.5.

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But the new enterprise value threshold is subject to a patchwork of exceptions. Notably, certain types of acquisitions will remain subject to the current *book value* test, such as acquisitions of Canadian cultural businesses, acquisitions by non-WTO-controlled purchasers (and from non-WTO non-Canadian sellers), and acquisitions by state-owned enterprises.<sup>26</sup>

For investments that are not subject to review, the notification process has historically been a straightforward notification form (setting out basic information about the investor and the acquired business) that can be submitted any time up to thirty days after the investment is completed.<sup>27</sup>

The new regulations will significantly increase the disclosure requirements of the notification form, which must be filed for all acquisitions of control by a non-Canadian investor (unless subject to review).<sup>28</sup> In particular, the new notification form will require:

- The legal names of the members of the investor's board of directors, its five highest-paid officers, and any person who owns ten percent or more of its equity or voting interests.<sup>29</sup>
- An indication of whether a foreign state owns a controlling or minority interest in the investor, and whether it has any special veto power or power to appoint directors or officers or direct strategic decision-making.<sup>30</sup>
- A copy of the purchase and sale agreement, together with the sources of funding for the investment.<sup>31</sup>

Any investment in Canada by a non-Canadian investor can be subject to a national security review if the Canadian government believes it may be injurious to Canadian national security. Changes to the ICA's national security regulations – which came into effect as of March 13, 2015 – extend various national security timelines, allowing the government more time to decide whether to initiate and complete a national security review.<sup>32</sup>

#### IV. CHILE

The highly controversial tax reform adopted in 2014 (Tax Reform) continues to influence the M&A landscape in Chile.<sup>33</sup> Certain provisions under the Tax Reform allow companies to take advantage of the more beneficial goodwill amortization under the former regime if a merger was initiated during 2014 and finalized before October 1, 2015, increasing year-end transactions in order to seize the transitory goodwill benefits.

The Tax Reform also includes an overreaching general anti-avoidance rule to re-characterize any transaction having a legal form which is deemed abusive, artificial, or inconsistent with its substance.<sup>34</sup> In addition to paying all taxes eluded (plus

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26. *Id.* § 4(1).

27. Investment Canada Act, R.S.C. 1985, c. 28, § 12 (Can.).

28. *Id.* § 11.

29. See Regulations Amending the Investment Canada Regulations, Schedule 1, *supra* note 19.

30. *Id.*

31. *Id.*

32. See *Regulations Amending the National Security Review of Investments Regulations*, SOR/ 2015-65.

33. Tax Reform, Law No. 20,780 (September 29, 2014) available at <http://reformatributaria.gob.cl/>.

34. Tax Code, Law No. 830, (December 27, 1974), art. 4 bis to art. 4 quinquies.

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readjustments and interests), penalties may also be imposed on attorneys, accountants, and other tax advisors who assisted in the “elusive” tax planning.<sup>35</sup> These new rules may impact cross-border investment and acquisition structures that have traditionally been used and increase tax costs.

As part of the Tax Reform, Chile’s long standing foreign direct investment (FDI) regime came to an end.<sup>36</sup> Formerly, foreign investors were able to enter into an agreement with the State of Chile to secure their rights. Law No. 20,848 (the New FDI Law) eliminates the ability to enter into such foreign investment agreements and establishes a straightforward approach, including certain rights for everyone who qualifies as a foreign investor.<sup>37</sup> Under the New FDI Law, only a certificate to be issued by the newly created Agency for the Promotion of Foreign Investment will be required to acknowledge that a foreign investor has the benefits of the New FDI Law.<sup>38</sup> It remains to be seen whether this step was in the right direction. Supporters and critics argue whether the new legal framework – upon completion of the current transitory period of 4 years - will have a positive impact on the total amount of FDI into Chile.

Another important development in the M&A sector is the bill that reforms Chilean antitrust laws (the Bill).<sup>39</sup> The Bill contemplates a mandatory merger control regime, which differs from the current voluntary system, for any operation exceeding certain thresholds to be determined by the Ministry of Economy. The new system proposes two review processes.<sup>40</sup> The first is a 30- day review by the Antitrust Prosecutor required to determine whether the transaction entails any possible antitrust risks. Such review may result in approval, approval subject to conditions, or rejection of the transaction. The second is an Antitrust Court review of any challenge to the Antitrust Prosecutor’s rejection.

## V. CHINA

On January 19, 2015, the Ministry of Commerce announced the draft of a new law that would revamp the legal framework for foreign investment in China. The draft Foreign Investment Law of the People’s Republic of China<sup>41</sup> (Draft Law) represents an ambitious effort to reform and modernize China’s approach to foreign investment.

The Draft Law eliminates the notion that foreign investments are regulated by the legal form of the investment, and instead looks to the nature of the investor and the source of

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35. *Id.* art. 100 bis.

36. Foreign Investment Statute, Decree Law No. 600 (July 11, 1974) *available at* <http://www.leychile.cl/Navegar?idNorma=74454>.

37. Law No. 20,848 (June 25, 2015), tit. I, ¶ 2, arts. 5-9, *available at* <http://www.leychile.cl/Navegar?idNorma=1078789&buscar=20.848>.

38. *Id.* art. 4.

39. The reform to the Antitrust Law was signed by the President and sent to Congress on March 16, 2015, *available at* [https://www.camara.cl/pley/pley\\_detalle.aspx?prmID=10362&prmBoletin=9950-03](https://www.camara.cl/pley/pley_detalle.aspx?prmID=10362&prmBoletin=9950-03).

40. Antitrust Law Reform, sent to Congress on March 16, 2015, tit. IV, art. 46 et seq, *available at* [https://www.camara.cl/pley/pley\\_detalle.aspx?prmID=10362&prmBoletin=9950-03](https://www.camara.cl/pley/pley_detalle.aspx?prmID=10362&prmBoletin=9950-03).

41. Foreign Investment Law of The Peoples’ Republic of China (Draft for Comments), English translation *available at* <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201501/20150100875221.shtml>.

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the investment to determine whether the investment is domestic or foreign.<sup>42</sup> Importantly, the law offers pre-entry national treatment to foreign investment and eliminates the need for governmental approval for some types of foreign investment. The Draft Law states that investments of foreign investors within China may enjoy national treatment, unless restrictions are stipulated in a catalogue of measures for foreign investments.<sup>43</sup> The contents of this catalogue of special administrative measures has not been revealed, and are not expected for some time. In the meantime, China's policy makers have moved ahead with expanding the use of "Pilot Free Trade Zones" where similar reform of the foreign investment system is being tested.

In April 2015, the liberalized system for review of foreign investment, which was established in the Shanghai Pilot Free Trade Zone in September 2013, was expanded to zones in the Tianjin Municipality, Fujian and Guangdong Provinces, as well as additional zones in Shanghai.<sup>44</sup> The general purpose of this reform is to implement new rules for cross-border investment and trade on a trial basis "in view of the requirements of internationalization and the rule of law,"<sup>45</sup> which may refer to concepts and standards found in bilateral investment treaties. The principle of pre-entry national treatment for certain types of foreign investment is at the center of these new rules. The Negative List (Negative List) for 2015<sup>46</sup> identifies 50 business sectors, with a total of 122 specific types of economic activity, representing a reduction of 139 types of business on the 2014 Negative List. Investment in any of the business activities on the Negative List will subject the foreign investors to the current system of government approval, whether the investment is made by acquisition of an existing enterprise or investment in a new one. For investment in business activities not on the 2015 Negative List, the foreign investor is to be treated in the same way as a Chinese investor.

For foreign investment outside of the Pilot Free Trade Zone, there has also been some simplifying of procedures. The Foreign Investment Guidance Catalogue (FIGC)<sup>47</sup>, which is China's statement of foreign investment priorities, divides foreign investment into encouraged, restricted, and prohibited. In addition, the FIGC is an important legal source for identifying when a joint venture is required or when the foreign investment stake must not exceed 50%. The 2015 FIGC revision<sup>48</sup> is notable for its reduction of the business sectors in which a joint venture is required or where majority Chinese ownership must be maintained.

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42. *Id.* arts. 11-15.

43. *Id.* art. 6.

44. *See* Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones (and the Negative List) issued by the General Office of the State Council (April 8, 2015).

45. *See* The General Plan for the China (Shanghai) Pilot Free Trade Zone issued by the State Council (September 18, 2013).

46. *See* Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones, *supra* note 44.

47. *See* The Foreign Investment Guidance Catalogue was first issued in 1995 by the State Planning Commission, Chinese text *available at* <http://www.mofcom.gov.cn/aarticle/b/t/200207/20020700031063.html>.

48. *See* The Foreign Investment Guidance Catalogue issued by the National Development Reform Commission and the Ministry of Commerce on March 10, 2015 and effective as of April 10, 2015, English translation and Chinese text *available at* <http://www.chinalawandpractice.com/sites/clp/2015/05/14/foreign-investment-industrial-guidance-catalogue-amended-in-2015>.

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**VI. INDIA**

Foreign direct investments (FDI) inflows to India are on an uptrend in 2015 on account of economic recovery. The Indian FDI regime has evolved with time, and the business environment has ensured foreign capital inflows to continue. The government of India (GoI) has made FDIs easier to stay in tandem with the global markets.

With a view to boost the 'Make in India' initiative, the GoI has extended the initial validity of industrial licenses to 15 years. Licenses in the defense sector are extendable to up to 18 years, due to the long gestation period of defense contracts.<sup>49</sup> In relation to railway infrastructure, 100% FDI has been permitted (other than in railway operations).<sup>50</sup> The FDI cap in the insurance<sup>51</sup> and pension<sup>52</sup> sectors has been raised from 26% to 49%. Foreign investors have also been permitted to invest up to 100% in white label ATM operations without any prior approvals.<sup>53</sup> This, along with the advent of payment banks, will result in greater accessibility to financial services and a step towards financial inclusion, which is a major goal of the GoI.

Previously, separate caps applied for FDI and foreign portfolio investment. Now, composite caps across all sectors have been introduced for simplifying the FDI policy.<sup>54</sup> Subject to certain sectoral conditions, all sectors except banking and defense are eligible for 49% foreign portfolio investment without prior approval of the GoI or Reserve Bank of India. This liberal approach aims to treat all kinds of foreign investment with parity. It is likely to lead to greater transparency, prevent confusion, and minimize due diligence.

FDI has now been permitted through issuance of partly paid shares (PPS) and warrants without any prior approval.<sup>55</sup> Previously, PPS and warrants could be issued to foreign investors only after obtaining approval from the GoI, creating a deterrent to use these instruments for FDI.<sup>56</sup>

Investments by non-resident Indians (NRIs), overseas citizens of India (OCIs), and persons of Indian origin (PIOs) will be treated as domestic investments and will not be required to comply with the restrictions and conditions for FDI<sup>57</sup>, but they will not be

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49. See Department of Industrial Policy and Promotion Press Note No 10, (September 22, 2015) available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn10\\_2015.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn10_2015.pdf).

50. See Department of Industrial Policy and Promotion Press Note No. 8, Policy for Private Investment in Rail infrastructure Through Domestic and Foreign Direct Investment (August 27, 2014) available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn8\\_2014.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn8_2014.pdf).

51. See Department of Industrial Policy and Promotion Press Note No. 3, Review of Foreign Investment (FDI) Policy on Insurance Sector Amendment to 'Consolidated FDI Policy Circular of 2014 (March 2, 2015) available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn3\\_2015.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn3_2015.pdf).

52. See Department of Industrial Policy and Promotion Press Note No. 4, Policy in Foreign Investment in Pension Sector (April 24, 2015), available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn4\\_2015.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn4_2015.pdf).

53. See Department of Industrial Policy and Promotion Press Note No. 11, (October 1, 2015) available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn11\\_2015.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn11_2015.pdf).

54. See Department of Industrial Policy and Promotion Press Note No. 8, *supra* note 50.

55. See Department of Industrial Policy and Promotion Press Note No. 9 (September 15, 2015) available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn9\\_2015.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn9_2015.pdf).

56. See Department of Industrial Policy and Promotion, FDI Circular (May 12, 2015) available at [http://dipp.nic.in/English/policies/FDI\\_Circular\\_2015.pdf](http://dipp.nic.in/English/policies/FDI_Circular_2015.pdf).

57. See Department of Industrial Policy and Promotion, Press Note No. 7 (June 3, 2015) available at [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn7\\_2015.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn7_2015.pdf).



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allowed to repatriate the money. The challenge, however, is that the relevant regulator is yet to issue an amendment on this issue.

India has been seeing significant economic growth over the past few years. This development has attracted foreign investors from various regions. The regulatory framework is also undergoing significant development. The 'Make in India' campaign has already brought commitments from manufacturing giants such as Foxconn<sup>58</sup> and General Motors<sup>59</sup>, and recently India jumped four places in the ranking of the World Bank for "Ease of Doing Business".<sup>60</sup>

## VII. LUXEMBOURG

The long-awaited law on electronic archiving<sup>61</sup> (the Law) was finally adopted in July 2015. The Law encourages the use of dematerialized documents by recognizing the same probative value as for originals.

In order to set a minimum standard for electronic documents and the trust therein, the Luxembourg legislator has created two new official statuses of certified service providers: (i) the digitization service provider and (ii) the electronic storage service provider (together, PSDCs).<sup>62</sup> PSDCs are certified intermediaries who have to comply with stringent rules regarding prior information of customers and transparency, subcontracting, duty of secrecy, obligations of continuity of the service in case of a transfer or cessation of a PSDC's activity, and prohibition to provide guarantees or collateral on electronic storage equipment.<sup>63</sup>

The Law provides a list of technical and organizational requirements for PSDCs.<sup>64</sup> Once certified, PSDCs must ask for a registration with the Luxembourg Institute for Standardization, Accreditation, Security and Quality of Products and Services (the ILNAS).<sup>65</sup> The ILNAS is also entrusted with the power to suspend or remove the certification of a PSDC at any time, if certain circumstances occur.<sup>66</sup> When PSDCs intend to provide their services to professionals active in the financial sector (e.g. banks and investment firms), they must also be authorized by the regulator of the Luxembourg financial sector (the CSSF) and comply with additional rules.<sup>67</sup>

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58. See *Boost for 'Make in India': Foxconn to Invest \$5 Billion in Maharashtra*, TIMESOFINDIA.COM (August 8, 2015) available at <http://timesofindia.indiatimes.com/tech/tech-news/Boost-for-Make-in-India-Foxconn-to-invest-5-billion-in-Maharashtra/articleshow/48401904.cms>.

59. See Aditi Shah, *GM to Invest \$1 Billion in India to Boost Exports*, REUTERS.COM (July 29, 2015) available at <http://in.reuters.com/article/2015/07/29/gm-india-investment-idINKCN0Q30X820150729>.

60. *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, WORLD BANK (2016) <http://www.doingbusiness.org/data/exploreeconomies/india#close>.

61. Law of July 25, 2015, on electronic archiving and amending art. 1334 of the Luxembourg Civil Code, art. 16 of the Commercial Code and the amended law of April 5, 1993, relating to the financial sector, available at <http://www.legilux.public.lu/leg/a/archives/2015/0150/a150.pdf>.

62. *Id.* art. 13, introducing the new articles 29-5 and 29-6 to the amended law of April 5, 1993, relating to the financial sector.

63. *Id.* art. 8.

64. *Id.* annex.

65. *Id.* art. 4.

66. *Id.* art. 5(1).

67. *Id.* art. 13, introducing the new articles 29-5(2) and 29-6(2) to the amended law of April 5, 1993, relating to the financial sector.

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Under the previous regime, the Luxembourg Code Civil recognized a pre-eminence of original documents over electronic copies if originals were still in existence (*i.e.* not physically destroyed). Electronic copies had the same probative value as an original document only when the original could not be produced and if the electronic copy had been made in accordance with certain requirements.<sup>68</sup> Since the implementation of the Law, the probative value of a document digitized by a PSDC no longer depends on the existence of the original document. They now have the same probative value as originals and cannot be dismissed by a judge for the sole reason that they are submitted in electronic form or because they have not been created by a digitization service provider.<sup>69</sup> It is noteworthy that the same probative value will only be awarded to electronic copies of documents signed under private seal (*actes sous seing privé*) and will not be extended to authentic deeds (*actes authentiques*).<sup>70</sup>

The Law is a milestone in the dematerialization era. Besides the obvious cost efficiency, the Law creates an environment that will improve the smooth access to documents within organizations and complement the existing efforts of Luxembourg to offer cutting-edge services and technologies for its prominent financial sector.

### VIII. NETHERLANDS

The trend of large foreign companies incorporating in the Netherlands because of its attractive business climate and flexible company law regime continued in 2015. Dutch company law allows Dutch companies to protect themselves against hostile takeovers and to grant special shareholder rights to reward long-term share ownership.

An anti-takeover measure commonly seen in the Netherlands involves the issuance of preference shares with disproportionate voting rights to a third party, often an independent Dutch foundation specifically created for this purpose. Protective preference shares are usually issued pursuant to a call option, to be exercised by the special purpose foundation in its discretion when an unwelcome takeover is thought to be imminent.

A recent example of a company that issued preference shares to prevent a hostile takeover is global pharmaceutical company Mylan N.V. (Mylan). When reincorporating in the Netherlands as part of its acquisition of the generic medicine business of Abbott Laboratories, Mylan adopted the possibility to issue preference shares to a special purpose foundation. In April 2015, Israel-based Teva Pharmaceutical Industries Ltd. (Teva) expressed its intention to make an offer for Mylan.<sup>71</sup> On June 4, 2015, the special purpose foundation of Mylan issued a press release in which it expressed its concern about Teva's intentions related to this intended acquisition and on July 23, 2015, the foundation announced it had exercised the call option because it believed that Mylan's best interests and those of its broader stakeholder constituencies were at risk as a consequence of the

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68. Luxembourg Code Civil, art. 1334.

69. Law of July 25, 2015, art.12 and art. 13, *supra* note 61.

70. *Id.* art. 2.

71. See David Wainer, *Teva Makes \$40 Billion Unsolicited Takeover Bid for Mylan*, BLOOMBERG (April 21, 2015, 3:19 PM), <http://www.bloomberg.com/news/articles/2015-04-21/teva-makes-40-1-billion-unsolicited-takeover-offer-for-mylan>.

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uncertainty and threats associated with a possible takeover by Teva.<sup>72</sup> Only days later, Teva formally dropped its bid for Mylan.<sup>73</sup>

A reason why large foreign companies may look favorably to the Netherlands as their place of incorporation is the ability under Dutch law to reward long-term share ownership and to promote stability of the company's shareholder base by granting special shareholder rights. In 2015, for example, sports car manufacturer Ferrari N.V. (Ferrari), incorporated in the Netherlands as a Dutch public company. In order to participate in Ferrari's loyalty voting program, a shareholder may at any time request that the company register common shares held by such shareholder in a loyalty register.<sup>74</sup> As a result of such registration, these shares are blocked from trading in the regular trading system and are transferrable only in very limited circumstances. If these shares have been registered in the loyalty register for an uninterrupted period of three years, the relevant shareholder will be entitled to receive special voting shares for no consideration. The special voting shares carry the same voting power as common shares but have immaterial economic entitlements. Such economic entitlements are designed to comply with Dutch law but are immaterial for investors. If the common shares are de-registered from the loyalty register, the relevant shareholder loses its entitlement to hold a corresponding number of special voting shares. Deregistration of common shares from the loyalty register allows the relevant shareholder to freely trade these shares again. Other large foreign companies that have adopted loyalty programs after incorporating in the Netherlands include car manufacturer Fiat Chrysler Automobiles N.V. in 2014 and heavy machinery and vehicles equipment manufacturer CNH Industrial N.V. in 2013. In addition, multinational cable and telecommunications company Altice N.V. adopted a multi-class share structure consisting of high-voting and low-voting shares when it reincorporated in the Netherlands in 2015.

## IX. SPAIN

A number of relevant legal developments have taken place in the corporate and M&A field in Spain in 2015, including the December 3, 2014 enactment of Law 31/2014 (the Reform Bill),<sup>75</sup> which amends the Spanish Companies Act (LSC)<sup>76</sup> to improve corporate governance. The Reform Bill entails a modernization of the corporate law in Spain for both public and privately held companies (including *sociedades anónimas* and *sociedades de responsabilidad limitada*) and codifies certain rules that were "soft law."<sup>77</sup>

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72. See Press Release, Mylan N.V., Stichting Preferred Shares Mylan expresses concerns (June 4, 2015) available at <http://www.prefs-mylan.nl/wp-content/uploads/2015/06/Stichting-Preferred-Shares-Mylan-expresses-concern.pdf>.

73. See Press Release, Teva Pharmaceutical Industries Ltd., Teva Withdraws Proposal to Acquire Mylan (July 27, 2015) available at <http://ir.tevapharm.com/phoenix.zhtml?c=73925&p=irol-newsArticle&ID=2071089>.

74. See Ferrari N.V.'s articles of association, available at <http://corporate.ferrari.com/en/governance/articles-association>.

75. Law 31/2014 Amendment to the Spanish Companies Act to Improve Corporate Governance (December 3, 2014) (Spain).

76. Royal Legislative Decree 1/2010, (July 2, 2010), Approval of Revised Text of Spanish Companies Act (Spain).

77. *Supra* note 75, the Reform Bill mostly follows the conclusions of the Report of the Commission of Experts ("Comisión de Expertos, Estudio sobre propuestas de modificaciones normativas") (October 14,

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The Reform Bill entered into force on December 24, 2014, although the provisions affecting the remuneration of directors<sup>78</sup> and certain provisions affecting listed companies (those referring to the configuration and duties of the board of directors)<sup>79</sup> entered into force on January 1, 2015, and will require approval in the first general meeting of shareholders following that date.

Essentially, the changes introduced by the Reform Bill focus on (i) general meetings and rights of shareholders, including an increase of powers of the general meeting, restrictions for challenging company resolutions and, conflict of interest situations preventing shareholders from casting votes and (ii) board of directors and directors' statute, including transparency rules for directors' remuneration, specification of fiduciary duties, and organization and powers reserved to the board of directors.

Of special interest for M&A transactions, the Reform Bill widens the powers reserved to the general meeting (and limits the scope of powers of directors) by vesting the authority in the general meeting to deliberate and approve of the acquisition, disposal, or contribution to another company of essential assets; assets representing over twenty-five percent of the total asset value reflected in the last approved balance sheet are presumed "essential assets".<sup>80</sup> Since its enactment, the scope and interpretation of this amendment and the consequences of the omission of the approval of the general meeting have been the subject of various discussions among leading practitioners and of recent resolutions issued by the Spanish General Directorate of Registries and Notaries (*Dirección General de los Registros y del Notariado*).

The Reform Bill has also strengthened the protection of minority shareholders. For instance, it has extended the definition of harm of the company's interest (*lesión del interés social*) to company resolutions adopted abusively by the majority of shareholders, so that these may be challenged.<sup>81</sup>

Relevant for public limited liability companies (*sociedades anónimas*), resolutions of a general meeting are adopted with a "simple majority," meaning when "more votes in favor than against the resolution are cast among the share capital present or represented."<sup>82</sup> Thus, shareholders who do not vote at the general meeting will not support the majority.

## X. UKRAINE

Ukraine's economy has been going through hard times during the last two years following the "Revolution of Dignity" in 2013, the annexation of Crimea by the Russian Federation in March 2014, and the ongoing war in the eastern part of Ukraine. The deepening political and economic crisis hit the domestic market and Ukraine's currency devaluated, which triggered the near collapse of the banking system. Consequently, M&A

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2013), available at [http://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CEGC\\_EstModif\\_20131014.pdf](http://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CEGC_EstModif_20131014.pdf). (Spain).

78. Law 31/2014 Amendment to the Spanish Companies Act to Improve Corporate Governance, sections 217 to 219, *supra* n. 75.

79. *Id.* §§ 529 *ter*, 529 *nonies*, 529 *terdecies*, 529 *quaterdecies*, 529 *quindecies*, 529 *septdecies*, 529 *octodecies* and 529 *novodecies*.

80. *Id.* § 160, ¶ f, and § 511bis, for listed companies.

81. *Id.* § 204.1 (setting out when a resolution is considered abusively imposed).

82. *Id.* § 201 (prior to the amendment this section referred to "ordinary majority" which caused certain interpretation issues).

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activity has generally slowed down and the majority of transactions are crisis driven and politically motivated restructurings.

This year already more than 50 banks have been placed under a temporary administration or undergone liquidation<sup>83</sup>, with more banks expected to run into a liquidity crisis soon. This situation has, however, created a window of opportunity for certain investors to acquire “burning” banking assets at a very attractive value. The sale of Ukrgasprombank and Astrabank to certain domestic and international investors are good examples.<sup>84</sup>

As a result of their inability to respond to the drop in commodity prices and the dramatic devaluation of Ukraine’s currency, some of the biggest domestic agricultural companies (including Ukrlandfarming and Mriya) were not able to serve their debt and entered into debt structuring processes, of which some are expected to be finalized in the near future through debt-to-equity swaps. Nonetheless, the agriculture sector remains one of the most important for the Ukrainian economy and is expected to help Ukraine to overcome the crisis. Ukraine has for years been considered the world’s grain basket and remains one of the global leaders in terms of grain export. The sector still has a huge growth potential and remains very interesting for domestic and international investors.<sup>85</sup>

Driven by Ukraine’s excellent technical universities and the very low domestic costs base, Ukraine rapidly strengthened its position in global IT-outsourcing. An increasing number of international software companies and end-users have been entrusting development and support of software products to Ukrainian IT-companies. As a result, this industry has become one of the most attractive for foreign investors.<sup>86</sup> The e-commerce sector has also been on the rise and has become very interesting for investors with recorded growth rates of over thirty percent for the last five years. This year, for example, Horizon Capital, a leading private equity fund manager, acquired a stake in ROZETKA, the biggest Ukrainian online retailer.<sup>87</sup>

Recently, the biggest-ever domestic transaction in the pharmaceutical sector closed with Swiss-based Acino Pharma acquiring Pharma Start, one of the major domestic pharmaceutical manufacturers.<sup>88</sup> The transaction is the most significant pharma-deal of the last few years and evidences that the Ukrainian life science sector remains a very attractive and highly profitable market.

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83. Deposit Guarantee Fund, Statistics (2015) *available at* <http://www.fg.gov.ua/en/statistics>.

84. Lyubomyr Shavalyuk, *Ukraine’s Banking Sector Faces Massive Consolidation and Change of Owners*, THE UKRAINIAN WEEK (October 9, 2015), *available at* <http://ukrainianweek.com/Economics/148364>.

85. Oleksandr Kramar, *Agribusiness Becomes the Biggest Component of Ukraine’s Economy. What Will it Take for the Growth to Continue?*, UKRAINIAN WEEK (August 25, 2015), *available at* <http://ukrainianweek.com/Economics/144123>.

86. Bozhena Sheremeta, *Ukraine’s IT Industry Makes Progress in 2014 Despite War*, KYIV POST (December 27, 2014), *available at* <http://www.kyivpost.com/content/business/ukraines-it-industry-makes-progress-in-2014-despite-war-376251.html>.

87. Press Release, Horizon Capital, Horizon Capital Invests in Rozetka, UKRAINIAN E-COMMERCE LEADER (July 15, 2015), *available at* [http://www.horizoncapital.com.ua/sites/default/files/rozetka\\_press\\_release\\_eng\\_final.pdf](http://www.horizoncapital.com.ua/sites/default/files/rozetka_press_release_eng_final.pdf).

88. Press Release, Acino Pharma AG, Swiss Acino Continues Expanding its Emerging Markets Business by Acquiring Pharma Start (October 7, 2015), *available at* [http://www.acino-pharma.com/html/uploads/media/Acino\\_2015\\_10\\_07\\_PHS\\_acquisition\\_en\\_kd48cw.pdf](http://www.acino-pharma.com/html/uploads/media/Acino_2015_10_07_PHS_acquisition_en_kd48cw.pdf).

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The Ukrainian government is also talking about the next wave of privatization of major infrastructure assets, such as seaport facilities, and energy and railway companies, which should attract the interest of major investors. Recently, for example, UBS was officially engaged as advisor to the Ukrainian State Property Fund with regard to the privatization of the Odessa Seaport Plant,<sup>89</sup> which is expected to be done in a most expedient and transparent manner.

## XI. UNITED STATES

Several Delaware court decisions have altered the landscape for M&A lawyers in the United States.

In *C&J Energy Services, Inc.*,<sup>90</sup> the Delaware Supreme Court lifted a preliminary injunction that had both enjoined a proposed “corporate inversion” merger between C&J Energy Services, Inc. and a division of Bermuda-based Nabors Industries Ltd., and required the C&J board to “shop” the company for thirty days despite the contrary terms of a signed merger agreement. Reversing the Chancery Court, the Delaware Supreme Court held that a corporate board may “pursue the transaction it reasonably views as most valuable to stockholders, so long as the transaction is subject to an effective market check under circumstances in which any bidder interested in paying more has a reasonable opportunity to do so.”<sup>91</sup> The court explained that the *Revlon* doctrine,<sup>92</sup> which requires a board to act reasonably to obtain the best reasonably available value for stockholders in a change of control scenario, does not require an active, pre-signing market check “so long as interested bidders have a fair opportunity to present a higher-value alternative and the board has the flexibility to eschew the original transaction and accept the higher-value deal.”<sup>93</sup> Because C&J had an informed, independent board, and had been able to negotiate “modest deal protection barriers” in its merger agreement with Nabors, the Supreme Court accepted a merger agreement with a “fiduciary out” and a post-signing, passive market check.

The Delaware Supreme Court further clarified *Revlon* in *Corwin v. KKR Financial Holdings LLC*.<sup>94</sup> Affirming the Chancery Court’s dismissal of a challenge to the merger between KKR & Co. L.P. and KKR Financial Holdings LLC, the court held that a fully informed, disinterested stockholder majority’s approval of a merger would invoke only the lenient “business judgment rule” standard of review of the board’s actions. In response to plaintiffs’ contention that *Revlon* required “enhanced scrutiny” of the board’s actions, the court stated that “*Unocal* and *Revlon* are primarily designed to give. . . the tool of injunctive relief to address important M&A decisions in real time, before closing,”—not to be used with “post-closing money damages claims in mind.”<sup>95</sup>

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89. *Thirteen Buyers interested in Odesa Port-Side Plant*, INTERFAX (October 9, 2015), available at <http://en.interfax.com.ua/news/economic/295517.html>.

90. *C & J Energy Services, Inc. v. City of Miami General Employees’ and Sanitation Employees’ Retirement Trust*, No. 655/657, 2014 (Del. December 19, 2014).

91. *Id.* at 1067.

92. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986).

93. *C & J Energy Services, Inc. v. City of Miami General Employees’ and Sanitation Employees’ Retirement Trust*, *supra* note 90.

94. *Corwin v. KKR Financial Holdings LLC*, No. 629, 2014 (Del. October 2, 2015).

95. *Id.*

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In a decision with significant implications regarding private mergers, the Delaware Court of Chancery in *Cigna*<sup>96</sup> held that (i) a general release of claims from the target's stockholders sought post-closing by the acquirer as a condition to their receipt of merger consideration was invalid for lack of consideration, and (ii) an acquirer's attempt to impose unlimited indemnification obligations, such as those typically associated with "fundamental representations," on those target stockholders that withheld consent to the merger was unenforceable because such obligations would render indeterminable the amount of merger consideration received.

Addressing the acquirer's attempts to secure a release from the target's stockholders through the use of a transmittal letter, the court noted that Section 251 of the Delaware General Corporation Law (the DGCL) conditions a stockholder's rights to receive its share of the merger consideration after the closing only upon the surrender of stock certificates. The release, unmentioned in the merger agreement, was not supported by separate consideration. The court also expressed concern that finding otherwise would result in future acquirers similarly imposing "almost any post-closing condition or obligation on . . . target stockholders after the fact. . . ."<sup>97</sup>

The court concluded that indemnification obligations unlimited in time or subject to an unlimited "clawback" would result in a target's stockholders being unable to ever ascertain the exact value of the merger consideration received, in violation of DGCL Section 251(b)(5). The Chancery Court was unwilling to foist such post-closing price adjustments on non-consenting stockholders. The *Cigna* decision has not reduced the number of private company mergers but has resulted in new approaches in the documentation to address these issues.

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<sup>96</sup> *Cigna Health and Life Insurance Co. v. Audax Health Solutions, Inc.*, C.A. No. 9405 (Del. Ch. November 26, 2014).

<sup>97</sup> *Id.*

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