The Year in Review

Volume 51 *International Legal Developments Year in Review: 2016* Article 6

January 2017

International M&A and Joint Ventures

Renata Antiquera

Alexandre Beçak David

Gordon N. Cameron

Elyse Velagic

Francisco Ugarte

See next page for additional authors

International M&A and Joint Ventures

Authors

Renata Antiquera, Alexandre Beçak David, Gordon N. Cameron, Elyse Velagic, Francisco Ugarte, Luciano Aguilera, Dr. Hermann J. Knott, Alessandra Tarissi de Jacobis, Claudio Corba Colombo, Eva Das, Frederik de Hosson, Vassily Rudomino, Anton Dzhuplin, Amgad T. Husein, Jonathan Burns, Adrienne Ellman, and Joseph J. Basile

International M&A and Joint Ventures

Renata Antiquera, Alexandre Beçak David, Gordon Cameron, Elyse Velagic, Francisco Ugarte, Luciano Aguilera, Dr. Hermann J. Knott, Alessandra Tarissi de Jacobis, Claudio Corba Colombo, Eva Das, Frederik de Hosson, Vassily Rudomino, Anton Dzhuplin, Amgad T. Husein, Jonathan Burns, Adrienne Ellman, and Joseph J. Basile*

This Article summarizes important developments during 2016 relating to international mergers and acquisitions and joint ventures in Brazil, Canada, Chile, Germany, Italy, Netherlands, Russia, Saudi Arabia, and the United States.

I. Brazil

A. Private Equity Investment Funds (FIPs)

The Brazilian Comissão de Valores Mobiliários ("CVM"), the equivalent of the American Securities and Exchange Commission, issued on August 30, 2016, Instruction no. 578[1] (ICVM 578), which regulates the formation, operation, and management of Private Equity Investment Funds (FIPs).[2] Foreigners investing in Brazil use FIPs for various reasons, including taxation. Before issuing ICVM 578, CVM held public hearings. CVM's Superintendent of Market Development, Antonio Berwanger, stated that "[t]he public hearing process generated an ample discussion with market players and brought important modifications to the final text of the ruling, which bring local regulations to a greater proximity with those

* Brazil—Renata Antiquera, who also served as Committee Editor, is a partner and Alexandre Beçak David is a founding partner of David, Aniceto, Stievano, Bosschart, Antiquera e Almendro Advogados Associados. Canada—Gordon Cameron is a principal and Elyse Velagic is an associate at the New York offices of Stikeman Elliott Law Firm. Chile—Mr. Francisco Ugarte is a partner of Carey Abogados, where Mr. Luciano Aguilera is an associate. Germany—Dr. Hermann J. Knott, is a partner of Luther's Cologne office. Italy—Alessandra Tarissi de Jacobis and Claudio Corba Colombo are partners of De Berti, Jacchia, Franchini, Forlani Studio Legale. Netherlands—Eva Das is a partner at Stibbe's New York office and Frederik de Hosson is an associate at Stibbe's Amsterdam office. Russia—Vassily Rudomino is a senior partner and Anton Dzhuplin is a partner of Alrud Law Firm. Saudi Arabia—Amgad T. Husein is the managing partner of Denton's Riyadh's office where Jonathan Burns is an associate. United States—Adrienne Ellman is an associate, and Joseph J. Basile is a partner of Foley Hoag LLP in Boston.

1. ICVM No. 578, Diário Oficial da União [D.O.U], 08.31.2016, 1 (Braz.).
2. *Id.*

internationally practiced, and aim to reflect more adequately market's operational reality."[3] Summarized below are some aspects of ICVM 578 with the most impact on the M&A market in Brazil and elsewhere.

1. *FIP Investments in Limited Liability Companies*

This is one of the most sought-after improvements of ICVM 578. Previously, FIPs were not allowed to invest in limited liability companies, one of the most common corporate forms in Brazil. That restriction either impeded acquisitions entirely or required a time and money consuming corporate reorganization of the target company.

Generally, under ICVM 578, in order for a FIP to invest in a limited liability company: (1) the FIP must participate in the decision-making process of the target limited liability company, effectively influencing its management and strategic policy, according to one of the methods listed in Article 6 of ICVM 578 and (2) the target limited liability company may have an annual gross revenue of up to BRL 300 million, depending on the investing FIP's classification.[4] There are exceptions to the participation in the decision-making process requirement. Under Article 6 of ICVM 578, a FIP is not required to participate in the decision-making process of the target limited liability company when (1) the FIP's investment in the company is reduced to less than half the percentage originally invested and represents less than 15 percent of the capital of the invested company or (2) the book value of the investment has been reduced to zero and, during a general shareholders' meeting, a majority of the subscribed units present vote to waive the requirement (unless a higher quorum is required by the FIP's regulations). Article 7 of ICVM 578 outlines other situations in which a FIP's participation in the decision-making process of the target limited liability company is not required.

2. *FIP Investments in Foreign Assets*

ICVM 578 also alters when FIPs may invest in foreign assets. For the purposes of ICVM 578, foreign assets are those assets whose issuer, at the moment the investment is made, is (1) headquartered outside Brazil or (2) headquartered in Brazil with assets located abroad corresponding to 50 percent or more of the total assets in its financial statements. A FIP may invest, directly or indirectly, in foreign assets up to the limitation of 20 percent of its subscribed capital, provided that (1) the assets are of the same economic nature as the eligible assets located in Brazil and (2) the FIP effectively influences the decision-making process of the foreign entity. In addition, a "multi-strategy" FIP offered exclusively to professional investors, as defined by legislation,[5] may invest up to the totality of its subscribed

3. *See CVM edita normas sobre fundos de private equity*, Comissão de Valores Mobiliários (Aug. 30, 2016), http://www.cvm.gov.br/noticias/arquivos/2016/20160830-2.html.

4. *See* ICVM No. 578, art. 14, Diário Oficial da União [D.O.U], 08.31.2016, 1 (Braz.).

5. *See* ICVM No. 554, art. 9, Diário Oficial da União [D.O.U], 12.17.2014, 7 (Braz.).

capital in foreign assets in certain circumstances such as if: (1) its regulation expressly allows it; (2) its regulation explicitly contemplates the exclusive participation of professional investors; and (3) the expression "Investimento no Exterior" ("Overseas Investment") is included in the FIP's name.

3. *FIP Advances for Future Capital Increase (AFAC)*

To the pleasure of players in the markets, ICVM 578 allows FIPs to make advances for future capital increase (AFACs) in their invested companies. A FIP may now make advances for future capital increase in publicly or privately held corporations that are included in its portfolio, provided that (1) at the time of the AFAC, the FIP was already a shareholder of the company; (2) the FIP's regulations expressly provide for AFACs and specify the subscribed capital that can be used for making the advance; (3) any form of repentance of the advance by the FIPs is prohibited; and (4) the advance is converted into capital increase within twelve months.

B. Expedited Legalization of Foreign Public Documents

Also in 2016, Brazil's enactment of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents became effective.[6] This change means that Brazilians abroad or foreigners within Brazil may use public documents quicker and for less money. It also means more efficiency and legal certainty for transactions that depend directly or indirectly on public documents, such as M&A.

II. Canada

On June 8, 2016, Bill 218, the Burden Reduction Act, 2016, passed the first reading in the Ontario legislature.[7] If enacted, Bill 218 would repeal Ontario's 99-year-old Bulk Sales Act (Act) and also modernize certain laws affecting Ontario business and commercial practice. Although the majority of Canadian jurisdictions have repealed similar statutes, Ontario (home to Canada's largest commercial center, Toronto) is the last Canadian common-law jurisdiction to maintain its bulk sales legislation. There is hope within the Ontario legal and business community that Royal Assent to Bill 218 will be received in this legislative session.

Historically, the Act was intended to protect creditors against the effect of an undisclosed (though valid) sale of all or substantially all of their debtors' assets and the possible unfair distribution or disbursement of the proceeds.[8] But because the Act applies to *all* bulk asset sales[9] in Ontario, regardless of

---

6. *See* Decreto No 8.660, de 29 de Janeiro de 2016, Diário Oficial da União [D.O.U.] de 1.29.2016 (Braz.).

7. *Burden Reduction Act, 2016*, S.O. 2016 (Can.).

8. Cieslok Media Ltd. v. Clarity Outdoor Media Inc. [2016] 129 O.R. 3d 589, para 10 (Can. Ont. Sup. Ct. J.).

9. *Bulk Sales Act, R.S.O. 1990, c B.14, s. 2 (Can.).*

whether the seller is solvent or not, it is significantly flawed. As a result of the Act's wide-reaching application, as early as 1950, the Canadian legal community noted that such undifferentiating compliance is onerous in commercial M&A transactions that are structured as asset deals.[10]

To comply with the Act, a purchaser of assets in Ontario must request and receive from the seller, and the seller is required to deliver to the purchaser a statement of creditors verified by affidavit.[11] Complying with the Act can be expensive and time-consuming, and accordingly asset-transaction parties often rely on compliance waivers and indemnities from failure to comply as a practical solution. Yet Ontario courts have been clear that waivers do not exempt sales of assets from the application of the Act.[12] As recently as 2016, in *Cieslok Media Ltd. v. Clarity Outdoor Media Inc.*, the Ontario Superior Court acknowledged that other provinces have repealed their bulk sales legislation in favor of something less onerous,[13] and observed that in Ontario the Act is still law and lacks a mechanism for parties to waive its requirements.[14]

While a seller may ask a court to exempt a sale from the Act,[15] the cost and time involved makes such applications burdensome and rare. But failure to comply with the Act can have significant consequences, as the Act allows courts to unwind a transaction and impose personal liability on a purchaser.[16]

Once Bill 218 receives Royal Assent, parties to asset deals or acquisition financings with assets located in Ontario will see a decrease of legal costs and deal risks. Having passed the first reading, on June 8, 2016, Bill 218 was referred to a committee of the legislature for further review before being voted on and passed into law at a later point in the current legislative session.

III. Chile

For the past two years, the Chilean economy has suffered a deceleration due partly to the end of the commodities super cycle. In 2015 M&A activity in Chile substantially decreased.[17] But this year, M&A activity in Chile has made an impressive comeback with transactions totaling over USD 20 billion. This rise is partially due to the favorable USD/CLP exchange rate and the conclusion of various government reforms.[18] Also, many

10. Fred M. Catzman, Q.C. "The Bulk Sales Act (Ontario)", 1 Can. Bar J. 38.
11. *Supra* note 9, at § 4.
12. *Cieslok Media Ltd.* 129 O.R. 3d. at para. 12.
13. *Id.* at para. 10.
14. *Id.* at para. 13.
15. *Supra* note 9, at § 3(1).
16. *Id.* at § 16(1).
17. Ximena Celedón, *Transacciones de M&A en mercado chileno cayeron casi un 60% durante 2015*, PULSO (Jan. 25, 2016), http://static.pulso.cl/20160124/2245065.pdf.
18. *Fusiones y adquisiciones aumentan 19% en América Latina a octubre*, DIARIO FINANCIERO (Nov. 15, 2016), https://www.df.cl/noticias/mercados/mercados-en-accion/fusiones-y-adquisiciones-aumentan-19-en-america-latina-a-octubre/2016-11-14/195347.html.

international rankings still consider Chile strong with respect to perceived corruption and investment opportunities in the region.[19]

A. Amendments to the Chilean Competition Statue

On August 30, 2016, Law Decree No. 211 (the Chilean Competition Statute) was amended by Law No. 20, 945.[20] Changes included redefining the standard of collusion and introducing applicable criminal penalties and mandatory consultation for certain mergers and acquisitions before the competent authority.[21]

Concentration transactions that exceed certain thresholds determined by the National Economic Prosecutor (*Fiscalía Nacional Económica* or FNE) are now subject to mandatory reporting. Concentration transactions are defined as any event, act, agreement, or combination thereof that cuts off an economic agent's independence. This includes mergers and direct or indirect acquisitions that allow the purchaser to exercise a decisive influence in the management of the competitor, joint ventures that form an independent economic agent, and acquisitions of the control of competitors' assets.

If applicable thresholds are met, the concentration transaction must be reported to and approved by the FNE. The transaction is suspended during FNE consideration. Within thirty days after the concentration transaction has been reported, the FNE must either (1) unconditionally approve the transaction, if convinced that the transaction does not substantially reduce competition; (2) approve the transaction provided that certain conditions are complied with, if convinced that the transaction does not substantially reduce competition; or (3) extend the investigation for an additional ninety-day period in order to gather more information. If the FNE remains silent after the expiration of the thirty-day period, the transaction is deemed approved. On the other hand, if the FNE has extended the investigation, upon the expiration of the investigation term, the FNE must affirmatively act, either approving the transaction (conditionally or unconditionally) or prohibiting it.

The amendment to the Chilean Competition Statue will probably delay closing of many future M&A transactions. But merger-control ultimately will benefit free-market competition, finally adapting Chilean practice to international standards.

---

19. *See 2015-2016 Scorecard*, LAVCA (2016), https://lavca.org/wp-content/uploads/2015/11/UPDATED-FINAL-Scorecard-15-16.pdf.

20. *Chile: Competition Law Amendments*, Guerrero Olivos, http://www.guerrero.cl/prontus_guerrero/site/artic/20161012/pags/20161012125459.html.

21. *Id.*

B. Court of Appeal Holds That Mergers Are Related-Party Transactions

On March 22, 2016, the Court of Appeals of Santiago held that mergers qualify as related-party transactions and are, thus, subject to the provisions of Title XVI (Related Party Transactions) of the Corporations Act, Law No. 18,046.[22] Title XVI applies to "any" transaction with a related party. In light of that wording, the Court determined that a related-party transaction is a broad and universal concept and, as such, does not exclude mergers. As a result, before shareholder approval of a merger, the requirements and procedures applicable to related-party transactions must be satisfied with respect to each merging entity. This decision came after the Chilean Securities and Insurance Commission had held, in light of the corporate reorganization of a leading electric company, that mergers of corporations (*sociedades anónimas*) were not related-party transactions, and consequently, were not subject to Title XVI of the Corporations Act.[23]

C. Expedited Legalization of Foreign Public Documents

As of August 30, 2016, Chile finally became a member of The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents,[24] doing away with the red tape previously required in connection with these documents. Foreign documents—such as powers of attorney, bylaws, articles of incorporation, and certificates of good standing—no longer require a lengthy legalization process, because a simple apostille will suffice. As soon as a competent authority affixes an apostille to the foreign document, the document is valid in Chile. Likewise, if documents issued in Chile are apostilled, then they will be valid in all other Member States to The Hague Convention.

IV. GERMANY

A. Market Developments

In Q1 through Q3 2016, Germany has attracted 599 deals worth EUR 51.0bn, a 13.3 % increase by value over the same period of 2015 (610 deals, EUR 45.0bn). "Industrials & Chemicals" was the most coveted sector by value, with 207 deals worth EUR 18.2bn increasing 30.4 percent compared to the same period of 2015 (186 deals, EUR 13.9bn).[25] In 2016 the cross-border activities of German companies have significantly increased, the best

22. Corte de Apelaciones de Santiago [C. Apel.] [Court of Appeals of Santiago], 20 julio 2015, "Administradora de Fondos de Pensiones Habitat S.A c. Superintendencia de Valores y Seguros," Rol de la causa: 8,069-2015 (Chile).

23. Letter from Superintendencia de Valores y Seguros to Gerente General No.15443 (July 20, 2015), *available at* http://www.svs.cl/documentos/ofo/ofo_15443_2015.xml.

24. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, T.I.A.S. No 10072, 33 U.S.T. 883.

25. Mergermarket trend report Q1-Q3 2016 for Germany.

illustration being the EUR 58.2bn takeover of Monsanto by Bayer,[26] which is still awaiting antitrust clearance.

China continues to invest heavily in Germany, with twenty-six deals worth EUR 8.8bn prompting some critics to describe this phenomenon as the sell-out of the German economy.[27] The reality appears to be more nuanced. Although some "black sheep" may try to enter the German market, serious-minded Chinese investors pursue a clear long-term strategy: they are willing to invest in research and development activities and jobs in order to be able to rely on technology "Made in Germany."

Another deal driver has been domestic restructuring like the carve-out of the conventional energy generation division from E.ON into Uniper. The UK's Brexit-vote is likely to cause foreign investors to divert their investments to the continent, potentially increasing German inbound M&A, although the weak pound may cause some opportunistic deals in the UK.

B. Imputation of Directors' Misconduct in Buy-Outs

A recent decision of the Higher District Court of Dusseldorf,[28] which is on appeal with the Federal Supreme Court, addresses the imputation of knowledge and misconduct of a target's managing directors in a management buy-out situation. Following the buyer's acquisition of all shares in several targets, two managing directors of the targets became shareholders of the buyer and one of them was appointed managing director of the buyer. Six months after the transaction, two targets had to file for insolvency proceedings. It was discovered that the two aforementioned managing directors knowingly had manipulated the balance sheets of the now-insolvent targets. The buyer sued the seller, seeking damages and rescission of the acquisition agreement on the basis of pre-contractual liability. The Higher District Court of Dusseldorf ruled in favor of the buyer, reasoning that the two managing directors had to be considered as agents (*Erfüllungsgehilfen*) of the seller. Therefore, their manipulations were imputable to the seller, at least in so far as the seller had based its actions on the documents that the directors had prepared during SPA negotiations.[29] Another issue was whether the buyer's claims should be precluded because knowledge of the manipulations was imputable to the buyer. The Court held that the buyer's claims were not precluded because the parties had agreed in the SPA that any imputation of knowledge applied only to independent guarantees and not to pre-contractual liability. Buyers should

26. *Bayer confirms $66bn Monsanto takeover*, BBC News (Sept. 14, 2016), http://www.bbc.com/news/business-37361556.

27. *See* M&A Review 10/2016, p. V.

28. Oberlandesgericht Düsseldorf [Higher District Court of Duseldorf], I-6 U 20/15, June 16, 2016 (Ger.).

29. *See id.* (German contract law allows for the exclusion of liability for the willful behavior of auxiliary persons).

seek to structure SPAs to exclude such imputation in as far-reaching terms as possible.

In light of this decision, the German M&A community has focused on best practices for drafting of contractual indemnity clauses in the context of M&A agreements. Such clauses should address the start date and the duration of the limitation period because there is a risk that the indemnification claim may be time-barred before the third-party claim against the target is due. One drafting solution is a time limitation that is dependent on the timeline for a third-party claim, in particular the buyer's (the indemnified party) notification to the seller (the indemnifying party) of a third-party claim: "Any indemnification claim pursuant to this clause shall be time-barred upon expiration of a period of . . . years after the purchaser has become aware of the facts giving rise to the claim."[30]

V. Italy

An issue that frequently arises at the decision stage of drafting SPAs is whether the target company (or its subsidiaries), instead of the purchaser, may be the beneficiary of an indemnity clause. Traditionally, target companies could not be indemnified in SPAs for the following reasons: (1) the parties to an SPA generally did not want to grant target companies any rights; (2) target companies were not subject to the arbitration clause of SPAs that would apply to the contractual parties; and (3) it might not be possible to compensate target companies under an indemnity clause if the purchase price had not yet been paid. Supporters of this approach refer to an old Italian case[31] in which the Supreme Court stated that, in similar cases, article 1411 of the Italian Civil Code, regulating the "agreement in favor of third parties," does not apply.[32] Therefore, a third party (*e.g.*, the target company) cannot be identified as the beneficiary of an indemnity clause in an SPA.

On the other hand, others note that the Court did not expressly prohibit such indemnity clauses in SPAs. Those commentators suggest that a target-company indemnity clause might be qualified as a special arrangement in favor of a third party with internal effects between the contractual parties ("*contratto a favore di terzi con efficacia interna*" or "*contratto con prestazione al terzo*").[33] According to this interpretation, the indemnity in favor of the target company takes effect, not from and by virtue of the agreement, but rather by its performance. This means that the parties to the SPA are obligated only vis-à-vis each other, but they can decide to grant the target company indemnity in accordance with the provisions of the indemnity clause.

30. Hilgard, BB 2016, p. 1218, 1233.

31. Italian Supreme Court (Cassazione civile), May 27th 1985, no. 2155, *Foro italiano*, 1987, I, 3124/3129.

32. *Id.*

33. *See* TARTAGLIA, *Acquisto di quote societarie e pacchetti azionari*, Maggioli, 2014, 114.

Now, however, the Court of Milan has made clear that tortured reasoning is not necessary. In a case issued on November 27, 2015,[34] the Court clearly stated that an indemnity clause that expressly identifies the target company as an indemnity beneficiary shall be admitted under Italian Law and will be governed by the provisions of Article 1411 of the Italian Civil Code. In light of that decision, the validity of target-company indemnity clauses cannot be denied any more. Further discussions, if any, might arise only on its exact legal qualification.

In light of this development, when drafting this type of clause, attention should be paid in order to (1) make clear and explicit the will of the parties to grant an "advantage" to the target company (or, should that be the case, its subsidiaries) and (2) make the granting of the indemnity to the target company, in any case, subject to the request of the purchaser party.

VI. Netherlands

During the negotiations of a public takeover, parties must attend to the managing of inside information and to ensuring compliance with the applicable rules on disclosure of inside information. A new European market-abuse regime entered into force on July 3, 2016.[35] The new European rules on market abuse are primarily documented in the regulation on market abuse[36] (the "Regulation") and the new directive on market abuse[37] (the "Directive"). The new European market- abuse regime aims to keep pace with market developments and to strengthen regulators' investigative and sanctioning powers, and repeals the market abuse directive from 2003.[38] The new European market abuse regime entails certain changes for the Netherlands, including (1) the rules on the publication of inside information and (2) the administrative fines that can be imposed in case of infringement.

The now-repealed Dutch market-abuse rules required listed companies to publish inside information as soon as possible.[39] Listed companies were, however, allowed to delay the disclosure of such information if, and only if, three cumulative requirements were met.[40] The Regulation, in principle, comprises the same requirements for delaying the publication of inside information. Under the regulation, listed companies may delay disclosure if (1) disclosure would likely prejudice legitimate interests of the listed company, (2) delay is not likely to mislead the public, and (3) confidentiality

34. Court of Milan, November 27th 2015, no. 13407, retrieved on the database https://www.iusexplorer.it. The Court has been partially preceded by other decisions of Italian Local Courts; *see* Court of Salerno, March 6th 2013, and Court of Appeal of Rome, June 3rd 2008.

35. *See* Commission Regulation 596/2014, 2014 O.J. (L 173) (EU).

36. *See* Commission Regulation 596/2014, 2014 O.J. (L 173) (EU).

37. *See* Council Directive 2014/57, art. 2, 2014 O.J. (L 173)(EU).

38. *See* Council Directive 2003/6, 2003 O.J. (L 96) (EC).

39. Wet op het financieel toezicht, Sep. 28 2006, Stb. 2007 (Neth.).

40. *See generally id.*

can be ensured.[41] The regulation, however, introduces certain additional administrative requirements. Under the new regime, listed companies must (1) notify the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten) of the delay immediately after the information is disclosed to the public[42] and (2) keep a record of the date and time when the inside information first existed, the moment when the decision to delay was taken, who was responsible for the decision, and evidence supporting each condition for the delay.[43]

The new market-abuse regime also imposes tougher administrative sanctions on a listed company that violates the rules on the publication of inside information. In particular, the administrative fines for serious infringements have been raised in the Netherlands. The base amount for administrative fines for serious infringements has been raised from EUR 2 million to EUR 2.5 million and the maximum fine from EUR 4 million to EUR 5 million.[44] As a result, the maximum fine for repeat infringements is now EUR 20 million,[45] provided that a maximum fine of up to 15% of net annual turnover has been introduced for large enterprises.[46] The AFM also has the power to impose a fine of three times the profits gained or losses avoided by an infringement.[47]

VII. Russia

In Russia, recent developments in civil law, arbitration reform, and litigation procedure are likely to affect the Russian M&A market. Global tendencies, economic sanctions imposed on Russia, and depreciation of the Russian Ruble have resulted in an acute need for the Russian economy to access new financial markets, increase in incoming external investments, improve the investment climate, and increase the number of internal M&A deals. In that context, a set of amendments mainly aimed at liberalization of the national legal system was introduced into the Russian legal system. During the previous year, the Russian legislature adopted a number of principles and mechanisms generally used in many other jurisdictions.

A. Contract Law Amendments to the Civil Code

The newly amended Russian Civil Code includes many changes in the area of contract law. The principle of good faith has been elevated above all

41. *See generally id.*
42. *See generally id.*
43. *See* Commission Implementing Regulation 2016/1055, 2016 O.J. (L173) (EU).
44. *Financial Markets in brief-new regulation and other developments*, De Brauw Blackstone Westbroek (July 13, 2016), http://www.debrauw.com/newsletter/financial-markets-brief-new-regulation-developments-3/#.
45. *Id.*
46. *Id.*
47. *Id.*

other contractual provisions.[48] As part of implementation of this principle, new legislation prohibits parties from entering into any negotiations without serious intentions and provides remedies for a party's groundless withdrawal from negotiations.[49]

Several new contract principles have been added. A "warranties" concept has been adopted.[50] Now, if a contract contains a warranties provision, a party is entitled to claim damages and in some cases termination of the contract upon the breach of such warranties even if no contractual obligations were breached.[51] Under the indemnification of losses concept, parties to a contract may now specify that, if certain events occur, one party will be obliged to indemnify the other party for the losses incurred as the result such events.[52] The amount of indemnification should, however, be measurable and the indemnified risk should arise out of the contract.[53] New injunction provisions allow a creditor to enforce a negative obligation (obligation not to perform certain actions) if there is a real threat of a breach of such obligation.[54] Now, when a party waives a contractual right, that waiver is binding on that party unless the waiver is prohibited by mandatory rules.[55] Option contracts and options to conclude a contract are now available.[56] Reversing the previous approach of jurisprudence, parties may now conclude options subject to potestative conditions (*i.e.*, conditions entirely within the control of one of the parties). Accordingly, a principal obligation may be entered into or performed unilaterally.

Additional changes to the code include:

- Under the new termination-fee concept, parties may unilaterally change or repudiate an obligation upon the payment of a specific fee.[57]
- The concept of a bank guarantee as a way to secure the obligations was replaced with a concept of independent guarantee, which may be issued not only by a credit institution, but also by any commercial organization.[58]
- Another newly introduced means for securing obligations is a so-called security deposit widely used in lease agreements.[59]

---

48. Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 307(Russ.).
49. *Id.* at art. 434.1.
50. *Id.* at art. 431.2.
51. *Id.* at art. 431.2, para. 2.
52. *Id.* at art. 406.1.
53. *Id.* at art. 406.1, para 1.
54. Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 450.1 (Russ.).
55. *Id.* at art. 450.1.
56. *Id.* at art. 429.3.
57. *Id.* at art. 310, para. 3.
58. *Id.* at art. 368.
59. *Id.* at art. 381.1.

B. Arbitration Reform

As of September 1, 2016, new legislation is in force in Russia governing international and domestic arbitration.[60] This legislation replaced the previous law in its entirety.[61]

The new legislation primarily focuses on bringing the Russian arbitration system further in line with the UNCITRAL Model Law. It accomplishes this by, among other things, adopting a more flexible approach to the form and contents of arbitration agreements,[62] introducing relatively clear-cut rules on the arbitrability of different types of disputes,[63] expanding the types of disputes subject to arbitration and improving communications between the court, arbitration tribunal, and arbitration institution.

C. Litigation Procedure

Among other litigation developments, courts no longer may reduce the size of the penalty upon its discretion. Such reduction is subject to the other party's respective claim and to proof of an explicit disproportion between the damages and penalties.[64] There are also further positive developments on the recognition and enforcement of foreign judgments.[65]

In summary, the above-mentioned changes result in a shift in choice of law in favor of Russian legal system at least for domestic M&A transactions taking place on the Russian market. Russia increasingly becomes compliant to the best world practices, becoming more flexible and providing better opportunities to the expanding demands of the market.

VIII. Saudi Arabia

Prior to Saudi Arabia's 2005 accession to the World Trade Organization (WTO), non-Gulf Cooperation Council (GCC)[66] investors could hold only

---

60. Federal'nyy zakon Ob arbitrazhe v Rossiyskoy Federatsii [Federal Law On Arbitration in the Russian Federation], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ.

61. *See generally* Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] (Russ.).

62. Federal'nyy zakon Ob arbitrazhe v Rossiyskoy Federatsii [Federal Law On Arbitration in the Russian Federation], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 7.

63. Arbitrazhnyy protsessual'nyy kodeks Rossiyskoy Federatsii[Arbitrazh Procedural Code of the Russian Federation], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 95-FZ, art. 225.1.

64. Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 333 (Russ.).

65. Federal'nyy zakon Ob arbitrazhe v Rossiyskoy Federatsii [Federal Law On Arbitration in the Russian Federation], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44, para. 3.

66. *See List of GCC Gulf Countries*, Dubaifaqs.com, (April 17, 2017) http://www.dubaifaqs.com/list-of-gcc-countries.php (the GCC member states consist of Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, and Oman).

up to 51 percent ownership in wholesale and retail trading entities. As part of the 2005 WTO accession, however, Saudi Arabia liberalized this restriction and allowed non-GCC investors to hold up to 75 percent ownership in such entities. Thus, since 2005, foreign investors seeking to establish a presence in Saudi Arabia to engage in wholesale and retail trade activities have been required to enter into a joint venture with a Saudi partner who holds a minimum 25 percent ownership interest in the entity.

In September 2015, the Saudi Arabian General Investment Authority (SAGIA—the government authority responsible for evaluating and issuing foreign investment applications and licenses) announced that foreign investors would be permitted to establish wholly owned wholesale and retail trade entities. At that time, SAGIA did not describe any conditions or restrictions that would apply, instead it merely invited interested parties to express their interest to SAGIA on a case-by-case basis. But on June 15, 2016, SAGIA released its Rules for Full Foreign Ownership of Retail and Wholesale Operations (the Rules), which provide as follows:[67]

Capital Requirements: The minimum paid-up capital for a wholly foreign owned wholesale and retail trading entity is SAR 30 million (about USD 8 million). In addition, the owner must invest at least SAR 200 million (about USD 53 million) in the entity over the course of five years beginning from the date of license issuance.[68]

Applicability: The owner of a wholly foreign owned wholesale and retail trading entity must be of a reputable nature such that it has a local presence in at least three international markets. In addition, only those foreign manufacturers who wish to sell their own products in Saudi Arabia may establish a wholly foreign owned entity. That is, a foreign investor who wishes to engage in wholesale or retail trade of other companies' products is still limited to the preexisting model that requires a minimum 25 percent local shareholding.[69]

Local Requirements: The foreign owner must manufacture a minimum of 30 percent of its products in-Kingdom.[70] Further, the foreign owner must establish an in-Kingdom logistics services and distribution hub and must invest at least 5 percent of its sales in in-Kingdom research and development programs.[71] But those local requirements are waived if the foreign owner invests an additional SAR 100 million (about USD 27 million) in the entity over the course of five years beginning from the date of license issuance—for a total of SAR 300 million (about USD 80 million) over five years.[72]

67. *Saudi Arabia Update—July 2016*, LEXOLOGY (July 27, 2016), http://www.lexology.com/library/detail.aspx?g=585f003a-2711-406d-a34b-ff385b3c877e.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

> Saudization: Related to the local requirements, the foreign owner must fulfill additional Saudization[73] requirements. Particularly, the entity must train at least 30 percent of its Saudi employees annually and commit to employing Saudi employees in leadership positions over the course of the first five years beginning from the date of license issuance. In addition, the foreign owner must employ a sufficient ratio of Saudi Arabian nationals in accordance with the requirements of the Ministry of Labor.[74]

According to public reports, only two wholly foreign owned wholesale and retail trading entities that have been licensed and established in Saudi Arabia as of yet—Dow Chemical Co. and 3M. The media report that high-level talks to establish such entities for companies including Pfizer and Apple are underway. Those companies provide examples of the types of foreign investors that the Rules appear to be targeting at this time. It will be interesting to see if the Saudi authorities, over time, seek to further liberalize this sector by allowing smaller capitalized foreign investors to wholly own retail and wholesale trading entities.

Relatedly, it is uncertain whether the Rules will remain consistent and how the various Saudi authorities will apply and respond to the Rules. Particularly, Saudization requirements tend to be a moving target and can fluctuate based on several factors including global market conditions, the domestic and regional economy, unemployment numbers, and the current political climate and rhetoric. It will be interesting to see how foreign investors will react to this inherent unpredictability when considering establishing a wholly owned wholesale and retail trading entity.

Similarly, the Kingdom is currently in a strong economic liberalization movement, which some experts have suggested is mostly motivated by globally low oil prices and, thus, requires the Kingdom to open up more to foreign direct investment to make up for its losses. As global oil prices continue to stabilize and rise, it will be interesting to see if this movement continues, stagnates, or, in the alternative, regresses as the perceived need for foreign investment in Saudi Arabia decreases with the comfort brought by higher-priced oil.

---

73. "Saudization" is a colloquial term used to refer to the government's official policy of encouraging the employment of Saudi nationals over foreigners and is implemented using various methods and programs. Companies are required to maintain a certain proportion of Saudi versus non-Saudi employees based on their size and the industry in which they operate, with large, high-paying, and high-tech companies often requiring the highest Saudization proportions, while small businesses and companies operating in manual labor and similar fields require lower proportions. Failure to adhere to Saudization requirements may result in denial of government services, including non-renewal of commercial and foreign investment licenses and employment visas for existing non-Saudi employees, as well as non-issuance of employment visas for new employees.

74. *Id.*

IX. United States

As in past years, one need not look beyond Delaware for the most important developments in United States M&A law during 2016. Building on its decision in *Corwin v. KKR Financial Holdings LLC*,[75] the Delaware Supreme Court in *Singh v. Attenborough*[76] reiterated the principle that a corporate board's decision to approve a merger will be subject to the lenient "business judgment rule" standard of review if the merger was adopted by a fully-informed, uncoerced, disinterested majority of stockholders.[77] The Delaware Supreme Court in *Singh* went on to state that approval of a merger by fully-informed, uncoerced, disinterested stockholders has the further effect of limiting judicial review to issues of "waste," with the burden of proof on the party attacking the transaction.[78] Because a determination of waste is supported only in limited circumstances when "no person of [ordinary] sound business judgment" could consider the change of control fair to the stockholders,[79] a scenario with little real-world likelihood if stockholders approve the deal, *Singh* effectively insulates corporate boards from liability in mergers that receive fully-informed, uncoerced, disinterested stockholder approval.[80]

Singh also addressed potential aiding and abetting liability for a board's financial adviser, a much-discussed issue since the Delaware Chancery Court's decision in *In re Rural/Metro Corporation Stockholders Litigation*.[81] The Court upheld the dismissal of claims against the financial advisor because the plaintiffs had not pled facts showing that the advisor "knowingly" misled the board. By requiring such a high standard of scienter, the Court effectively foreclosed aiding and abetting claims against financial advisors except in the most egregious circumstances.

The Delaware Chancery Court also extended the principles in *Corwin* to the tender offer context.[82] In *In re Volcano Corporation Stockholder Litigation*,[83] the Court dismissed the plaintiffs' claims, holding that the tendering of shares by a majority of fully-informed, uncoerced, disinterested stockholders in a tender offer has the same effect as the cleansing vote of a fully-informed, uncoerced, disinterested stockholder majority in a merger.[84] The Delaware Chancery Court reasoned that the rationale behind the *Corwin* holding that "a transaction approved pursuant to a statutorily required stockholder vote [should be afforded] the benefit of the irrebuttable business judgment rule

75. Corwin v. KKR Financial Holdings LLC, 125 A.3d 304 (Del. 2015).

76. Singh v. Attenborough, 137 A.3d 151 (Del. 2016).

77. *Id.* at 151.

78. *Id.*

79. *Id.* at 152 (quoting Saxe v. Bracy, 184 A.2d 602, 610 (Del. Ch. 1962)).

80. *Id.*

81. *In re* Rural Metro Corp., 88 A.3d 54 (Del. Ch. 2014), *aff'd sub nom* RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 862 (Del. 2015).

82. *In re* Volcano Corp., 143 A.3d 727 (Del Ch. 2016).

83. *Id.* at 727.

84. *Id.*

presumption"[85]—applied equally in a tender offer and, in any event, that a stockholder acceptance of a tender offer constitutes stockholder approval of a change of control transaction under Delaware law.[86]

Finally, in a much discussed appraisal decision, the Delaware Chancery Court in *In re: Appraisal of Dell Inc.* determined that the "fair value" of the plaintiffs' stock was $17.62 per share rather than the $13.75 transaction price, resulting in a 28 percent increase to the price resulting from the auction process.[87] The Court pointed to, among other things, the fact that all bidders were financial buyers who used LBO pricing models that, in the Chancery Court's view, value transactions below "fair value" within the meaning of the Delaware appraisal statute.[88] The Court reasoned that "[w]hat a [financial buyer] is willing to pay diverges from fair value because of (i) the financial sponsor's need to achieve [internal rates of return] of 20% or more to satisfy its own investors and (ii) limits on the amount of leverage that the company can support and the sponsor can use to finance the deal."[89] While Delaware case law has long recognized that the merger price is not necessarily the same as "fair value" for purposes of the appraisal statute, many practitioners had grown to expect that the merger price for a public company determined by an auction process would likely approximate "fair value." But *In re Appraisal of Dell Inc.* signals that financial buyers approaching deals should factor in the possibility of an unfavorable appraisal outcome.

85. *Id.* at 743.
86. *Id.* at 744.
87. *In re* Appraisal of Dell Inc., C.A. No. 9322-VCL (Del. Ch. May 31, 2016).
88. DEL. CODE ANN. tit. 8, § 262 (West 2017).
89. *In re* Appraisal of Dell Inc., C.A. No. 9322-VCL at 64.