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International M&A and Joint Ventures

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This article summarizes important developments during 2019 in international mergers, acquisitions, and joint ventures in Argentina, Brazil, Canada, Chile, Colombia, Germany, Israel, Italy, Mexico, Peru, Poland, Russia, Saudi Arabia, and Spain.

I. Argentina

A. THE NEW REGIME FOR THE PROMOTION OF THE KNOWLEDGE ECONOMY

After a time of political uncertainty culminating in the recent change of government, Argentina's current administration finalized and enacted Law 27.506 of the Regime for the Promotion of the Knowledge Economy (the Regime)¹, through Decree 708/2019² and Resolution 449/2019 of the

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1. See Law No. 27506, June 10, 2019, art. 1 (Arg.), *available at* <http://servicios.infoleg.gob.ar/infolegInternet/anexos/320000-324999/324101/norma.htm>.

2. See Decree No. 708/2019, Oct. 16, 2019, art. 1 (Arg.), *available at* <https://www.boletinoficial.gob.ar/detalleAviso/primera/218835/20191016>.

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Secretariat of Entrepreneurs and Small and Medium Enterprises.³ The Regime, which will enter into force on January 1, 2010, expands on the Promotion of the Software Industry Law, which is in force through December 31, 2019.⁴ The Promotion of the Software Industry Law, which was adopted during President Néstor Kirchner's government and expanded exponentially during the recent Presidency of Mauricio Macri, facilitated the development of major unicorn companies, such as Mercado Libre and Globant.⁵ Since the Law's enactment in 2004, the number of employees in the software industry has increased from 20,000 to 120,000, and Argentine's exports went from USD 100 million to USD 1.8 billion.⁶ Knowledge-based services are expected to grow from today's USD 6 billion to USD 15 billion by 2030.⁷

The Regime aims to improve the quality, competitiveness, and volume of export products. It promotes the creation, design, development, production, implementation, and adaptation of products, services, and technical documentation.⁸ The regime applies to basic and applied technological development, including parts of technology devices. It covers a wide range of economic activity, including software, computer, and digital services; audiovisual production and postproduction; biotechnology; genetic engineering; geological services; services relating to electronics and communications; professional services to the extent that they are being exported; nanotechnology and nanoscience; aerospace and satellite industry; and the manufacturing of goods and services for automation solutions, but only if they use industry 4.0 technologies, such as artificial intelligence, robotics, and industrial internet.⁹

The Regime offers the following benefits: (1) fiscal stability until December 31, 2029; (2) reduction of employer contributions; (3) a tax credit bonus of 1.6 times the employer contributions, which can be applied to Income Tax and VAT, (4) reduced rate of fifteen percent on Income Tax; (5) no withholdings or perceptions of VAT; and (6) the equivalent of a Double Taxation Treaty (DTT), because art. 12 of the Law permits deduction of all

3. See Resolution No. 449/2019, Oct. 18, 2019, art. 1 (Arg.), available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/330000-334999/330205/norma.htm>.

4. See Law No. 25,922, Sept. 7, 2004, art. 4 (Arg.), available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/95000-99999/98433/norma.htm>.

5. See *Argentina is Upping its Tech Game*, THE NEWTECH MAG (May 9, 2019), <http://newtechmag.net/2019/05/09/argentina-is-upping-its-tech-game/>.

6. See *Argentina: Software and Computer Services Shows Exports Record*, STAFFING AMER. LATINA (May 17, 2019), <https://staffingamericalatina.com/en/argentina-el-sector-del-software-y-servicios-informaticos-registra-un-record-de-exportaciones/>.

7. See Amy Critchley, *Argentina's 'Knowledge Economy Law' Creates Great Expectations, Challenges*, NEARSHORE AMER. (May 2019), <https://nearshoreamericas.com/argentinas-knowledge-economy-law-creates-great-expectations/>.

8. See Law No. 27506 of June 10, 2019, at art. 2.

9. See *id.*

analogous taxes paid or withheld abroad.¹⁰ In conclusion, the Regime constitutes a true state policy that serves an urgent need in Argentina.

II. Brazil

The year 2019 brought many legislative changes in Brazil. In pursuit of its liberal agenda, the new government approved several important acts that aim to reduce bureaucracy and stimulate economic activity. This overview describes new legislation that directly affects corporate activities, including M&A and joint venture transactions.

A. AIRLINE COMPANIES

The enactment of Law 13.842/19 reversed restrictions on the investment of foreign capital in airline companies.¹¹ The Law revokes provisions of the Brazilian Aeronautical Code, which imposed the following requirements on airline companies: (a) a minimum of eighty percent of the voting capital must be held by Brazilian citizens; (b) only Brazilian citizens can serve on executive boards; (c) issuance of nominative voting shares for airline companies that are incorporated as corporations; and (d) prior approval by the Brazilian National Civil Aviation Agency for acts of incorporation and subsequent amendments.¹²

B. PUBLICATION REQUIREMENTS

Brazil also changed certain notice and disclosure requirements. Closely held corporations with a net equity of no more than \$10 million and no more than twenty shareholders may call their general meetings by means of a call notice delivered to all shareholders, which must comply with the requirements of article 124 of the Corporations Law.¹³ Additionally, for purpose of registration with the Board of Trade, such corporations do not need to separately publish balance sheets and financial documents, provided that these documents are attached to the minutes of the shareholders meeting in which they were approved.

The Federal Government also published Provisional Measure 892/19 (the PM).¹⁴ The PM purports to eliminate the requirement that corporations publish certain corporate documents (call notices, meeting minutes, shareholder notices, management's report and financial reports, and any

10. *See id.* arts. 7–10.

11. *See* Lei No. 13.842, de 17 de Junho de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.6.2019 (Braz.).

12. *See* Lei No. 7.565, de 19 de Dezembro de 1986, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.1986 (Braz.).

13. *See* Lei No. 6.404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.).

14. *See* Medida Provisória No. 892, 5 de Agosto de 2019 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Mpv/mpv892.htm#art1.

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other document for which the Corporations Law requires publication)¹⁵ in the Official Gazettes and large circulation newspapers. Eliminating the publication requirement would reduce bureaucracy and substantially reduce corporations' expenses. Because Congress failed to confirm and convert the PM into law within 120 days of publication, it did not become permanently effective.¹⁶ But it is likely that a new federal law amending the Corporations Law as envisioned by the PM will be proposed in the near future.

C. SOLE PROPRIETORSHIP LIMITED COMPANY

Law 13.874/19 created the Sole Proprietorship Limited Company, a limited liability company that has only one partner.¹⁷ By eliminating the need for a second partner, this new type of business organization reduces the bureaucracy involved in creating and maintaining companies. The second partner was often added only to comply with the formation requirements of a Limited Liability Company, especially in situations in which a partner desired to avoid the minimum equity capital requirement for the Individual Limited Liability Company (Eireli) or already held one Eireli.¹⁸

III. Canada

Despite a modest decline in transaction count, M&A activity in Canada remained steady in the first half of 2019, due to high transaction values driven by an increase in the number of megadeals, compared to the first half of 2018.¹⁹ In addition to several significant acquisitions in the mining industry, results in consumer markets and financial services were buoyed by cannabis and asset management deals.

A. MINING

The year 2019 kicked off with Barrick Gold Corporation's acquisition, on January 1, of Randgold Resources Limited for USD 7.7 billion.²⁰ Newmont Mining Corporation, one of Barrick's competitors, announced it would acquire Goldcorp Inc. for USD 17 billion, creating the world's largest

15. See Lei No. 6.404, de 15 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976, arts. 124, 133 (Braz.).

16. See Ato Declaratório do Presidente da Mesa do Congresso Nacional No. 68 de 2019 (Braz.), available at http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Congresso/adc-68-mpv892.htm.

17. See Lei No. 13.874, de 20 de Setembro de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.09.2019 (Braz.), available at http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13874.htm.

18. See *id.*

19. See DUFF & PHELPS, CANADIAN M&A 3 (Summer 2019), <https://www.duffandphelps.com/-/media/assets/pdfs/publications/mergers-and-acquisitions/canadian-ma-insights-summer-2019.ashx>.

20. See *id.*

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publicly traded gold-mining company.²¹ Thereafter, in an offer conditioned on Newmont not closing the Goldcorp deal, Barrick launched a hostile takeover bid for all outstanding shares of Newmont. After much antagonism, on July 1, 2019 the parties agreed to combine their Nevada assets in a joint venture deal designed to unlock USD 5 billion in synergies.²²

B. CANNABIS

Transactions in Canada's budding cannabis industry represented 52.1 percent of overall deal value in consumer markets in Q2 2019.²³ In anticipation of American legalization of cannabis, thirty-five of fifty outbound deals in the first half of 2019 involved an American target.²⁴ The benchmark deal in this subset was Canopy Growth Corporation's arrangement with Acreage Holdings, Inc., which was implemented on June 27, 2019, and granted Canopy the option to acquire all shares of Acreage for USD 3.2 billion upon legalization of marijuana in the United States at the federal level.²⁵

C. ASSET AND WEALTH MANAGEMENT

In Q1 2019, industry consolidation drove up deal volume in asset and wealth management by fifty percent over Q4 2018.²⁶ Two noteworthy business combinations significantly bolstered deal value in this sector. First, on March 13, 2019, Brookfield Asset Management Inc. announced it would buy most of Oaktree Capital Group LLC for roughly USD 4.8 billion,²⁷ creating an alternative-asset manager that would rival industry leader Blackstone Group in size. Second, on June 3, 2019, Onex Corporation acquired Gluskin Sheff + Associates Inc. for USD 330 million,²⁸ combining two of Canada's pre-eminent investment firms.

21. *See id.*

22. Newmont Goldcorp Corp., Annual Report (Form 8-K) (June 30, 2019).

23. *See* Michelle Pickett et al., *Consumer Market Deals Activity*, PWC (Q2 2019), <https://www.pwc.com/ca/en/industries/retail-consumer/consumer-markets-deals-insights-q2-2019.html>.

24. *See id.* at 3.

25. *See id.*

26. *See* KPMG, *CANADIAN FINANCIAL SERVICES M&A NEWSLETTER 5* (Q1 2019), <https://assets.kpmg/content/dam/kpmg/ca/pdf/2019/04/canadian-financial-services-ma-quarterly-newsletter-q1-2019.pdf>.

27. *See* Press Release, Brookfield Asset Mgmt. Inc., Brookfield to Acquire 62% of Oaktree Capital Management (Mar. 13, 2019), <https://bam.brookfield.com/press-releases/2019/03-13-2019-132118887>.

28. *See* Press Release, Onex Corp., Onex Completes Acquisition of Gluskin Sheff (June 3, 2019), <https://www.globenewswire.com/news-release/2019/06/03/1863251/0/en/Onex-Completes-Acquisition-of-Gluskin-Sheff.html>.

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D. CONCLUSION

While global trade tensions and economic uncertainty remain, many are optimistic about the Canadian M&A market heading into 2020.²⁹ Buyers should continue to take advantage of an extended gold rush, a second wave of cannabis deals brought about by continued legalization efforts, and further consolidation in the asset and wealth management industry.

IV. Chile

Despite the negative impact of the U.S.-China trade war and the political turmoil in Chile during Q4 2019, M&A activity in Chile has remained relatively strong. During the first half of 2019, compared to the same period in 2018, the number of M&A transactions increased by thirty-three percent, but the USD volume decreased by twelve percent, totaling over USD 31.7 billion.³⁰ Chile continues to hold a strong position in international rankings, and is perceived as investor-friendly within the region.³¹

A. NEW REPORTING THRESHOLDS

Resolution No. 157, which was published in the Official Gazette on March 29, 2019 by the National Economic Prosecutor (*Fiscalía Nacional Económica*, the FNE) and took effect on August 9, established new sales thresholds that trigger mandatory notification of concentration operations to the FNE.³²

Resolution No. 157 increases the prior thresholds as follows: (1) from UF 1,800,000 (approx. USD 68 million) to UF2,500,000 (approx. USD 94 million), when assessing the sum of the annual sales of the parties contemplating a concentration operation; and (2) from UF 290,000 (approx. USD 11 million) to UF 450,000 (approx. USD 17 million), when calculating the annual sales of each of such parties separately.³³ The regulatory change complies with international standards because, in practice, many operations that were subject to mandatory reporting under the prior thresholds proved to be harmless to free-market competition.

29. See KPMG, *supra* note 26, at 2.

30. See Gabriel Alvarez, *Chile is the Only Country in the Region Where M&A Transactions Increase in the First Half*, LA TERCERA (Aug. 15, 2019), <https://www.latercera.com/pulso-trader/noticia/chile-unico-pais-region-aumentan-transacciones-ma/783417/>.

31. See LATIN AMER. PRIV. EQUITY & VENTURE CAP. ASSOC., SCORECARD 10 (2017 – 2018), <http://www.transparency.org/cpi2018>.

32. See Resolution No. 157, Marzo 29, 2019, FISCALÍA NACIONAL ECONOMÍA [FNE] (Chile.) available at <https://www.fne.gob.cl/wp-content/uploads/2019/03/Resoluci%C3%B3n-exenta-157.pdf>.

33. See *id.*

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B. MODERNIZATION OF CHILEAN BANKING LAW

After a year and a half of legislative discussion, Law No. 21.130 was enacted on January 12, 2019.³⁴ This new law overhauls the banking legislation contained in the General Banking Law, modernizes corporate governance and bank failures mechanisms, increases the powers of the banking regulator, and incorporates new capital and reserves requirements to bring Chilean law in line with Basel III guidelines.³⁵

One of the main features of the law is the adoption of consolidated comprehensive financial supervision in Chile. To this end, the Law integrates the bank regulator Superintendence of Banks and Financial Institutions into the Financial Market Commission,³⁶ successor of the Superintendence of Securities and Insurance. Going forward, all institutions that used to come under the oversight of the Superintendence of Banks and Financial Institutions (including banks, issuers, and operators of credit or payment cards with provision of funds) will be supervised by the Financial Market Commission.

V. Colombia

A. FINANCING LAW DECLARED UNCONSTITUTIONAL

Law 1943 of 2018,³⁷ commonly known as the Financing Law, was built as a pillar of Colombia's fiscal sustainability and aimed to play a crucial role in financing the public budget for the four-year presidential tenure that began in August 2018.³⁸ Rather than engaging in a comprehensive tax reform, the Financing Law was conceived to facilitate the funding of the current government's projects and the balancing of the national budget. The Financing Law also aimed to increase economic growth, strengthen progressive tax structures, simplify the tax system, and ensure fiscal sustainability.³⁹

Unlike other tax reforms, the Financing Law took a targeted approach, eliminating specific taxes for certain taxpayers and provides rules aimed at preventing tax evasion.⁴⁰ The Law sought to help enterprises, who are considered the engine for sustained economic growth, by reducing their effective tax burdens and simplifying their tax obligations. The Law's

34. See Law No. 21.130 art. 1, Diciembre 27, 2018, DIARIO OFICIAL [D.O.] (Chile), *available at* <https://www.leychile.cl/Navegar?idNorma=1124459>.

35. See *id.*

36. See Law No. 21.000 art. 1, Febrero 10, 2016, DIARIO OFICIAL [D.O.] (Chile), *available at* <https://www.leychile.cl/Navegar?idNorma=1100517>.

37. L. 1943/18, diciembre 28, 2018, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://www.secretariassenado.gov.co/senado/basedoc/ley_1943_2018.html#T%C3%8DTULO%20I.

38. See *Explanatory Memorandum for Law 1943 of 2018*, MINISTER OF FIN. & PUB. CREDIT 1 (2019), [http://www.comunidadcontable.com/BancoMedios/Documentos%20PDF/pl-240-18c\(reforma%20tributaria\)-exposici%C3%B3n%20de%20motivos.pdf](http://www.comunidadcontable.com/BancoMedios/Documentos%20PDF/pl-240-18c(reforma%20tributaria)-exposici%C3%B3n%20de%20motivos.pdf).

39. See *id.* at 6–8.

40. See *id.* at 8.

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explanatory memorandum explains that high tax burdens negatively affect the competitive positions of national firms.⁴¹ Moreover, to the extent that taxes reduce the expected return for foreign investors, they constitute an obstacle to foreign investment in Colombia.⁴²

The Financing Law enacted two tax regimes that are particularly relevant for M&A: (1) the holding companies regime, which seeks to adopt the international trend on a special dividend tax regime to channel investments through Colombia; and (2) the indirect sales regime, which levies the disposal of shares in a foreign company that in turn owns an equity interest in a Colombian entity.⁴³

On October 16, 2019, the Constitutional Court struck down the Financing Law after a group of citizens launched a challenge to its constitutionality on the basis that the Colombian legislature had not complied with procedural requirements in approving the law.⁴⁴ As a result, the Financing Law lost its binding effect on January 1, 2020.⁴⁵ The Colombian government had to work quickly to pass new legislation that was almost identical to the Financing Law. On December 27, 2019, the Colombian Congress finally approved the “Economic Growth Law”⁴⁶ which mostly reproduced the Financing Law, thus ensuring continuity of the administration’s plans. Local and foreign investors and participants in M&A activity are keenly interested in two regimes described above, which are now current and in force in Colombia. The passage of new legislation as they are finalizing their 2020 budgets during the last weeks of the year and financial terms. The legal uncertainty regarding the Financing Law may affect Colombia’s risk profile in the eyes of foreign stakeholders and discourage investment.⁴⁷

VI. Germany

A. GERMAN COURT HOLDS U.S. COMPANY IN BREACH OF CONTRACT FOR FORUM SHOPPING

U.S. entities often file actions in U.S. courts in violation of contractual agreements requiring them to submit disputes to a foreign court. They do so in the hopes that the threat of litigating in the U.S. legal system—including the uncertainties inherent in jury trials and punitive damages, two

41. *See id.* at 37.

42. *See id.* at 39.

43. *See id.* at 83.

44. Libroero Caicedo, Case: D-13207, Judgment C-481-2019, (October 16, 2019), *available at* http://www.secretariasenado.gov.co/senado/basedoc/c-481_1919.html#INICIO.

45. *See Colombia Presents New Tax Bill to Congress Following Court Ruling*, REUTERS (Oct. 22, 2019), <https://www.reuters.com/article/colombia-tax/colombia-presents-new-tax-bill-to-congress-following-court-ruling-idUSL2N2771W6>.

46. L. 2010/19, diciembre 27, 2019, Diario Oficial [D.O.] (Colom.), *available at* http://www.secretariasenado.gov.co/senado/basedoc/ley_2010_2019.html.

47. *See id.* at ¶ 7.

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concepts that are virtually unknown in the German legal system— encourages foreign parties to settle quickly in order to “cut their losses.”⁴⁸ Often, that is exactly what happens.

In a recent case, Deutsche Telekom took a different approach. Cogent Communications Holdings, Inc., a U.S. entity, and Deutsche Telekom AG, a German entity, entered into an Internet Peering Agreement, where each entity regulated data exchanges to ensure a free flow of Internet traffic between the two entities.⁴⁹ Cogent believed that Deutsche Telekom breached this Agreement by failing to increase the technical capacity at two peering points, thereby preventing a smooth exchange of traffic.⁵⁰ Even though the parties had contractually agreed that any disputes were to be resolved in the courts of Bonn, Germany, and that German law governed the contract, Cogent filed a complaint for breach of contract with the District Court for the Eastern District of Virginia.⁵¹ Deutsche Telekom sought dismissal of the U.S. action, claiming that the Internet Peering Agreement called for litigation in Germany and was governed by German law. The U.S. District Court enforced the parties’ dispute resolution clause and dismissed the case.⁵²

Cogent subsequently filed an action in Germany in 2019, prompting Deutsche Telekom to file a counterclaim, seeking recovery of the costs it incurred in defending itself before the U.S. District Court.⁵³ Unlike U.S. law, German law subscribes to the principle that the losing party must reimburse the prevailing party for its litigation costs (though those costs are often capped).⁵⁴ Deutsche Telekom incurred legal costs of approximately USD 200,000 to defend itself in the action before the U.S. District Court.⁵⁵ The German Federal Court held that Cogent breached the dispute resolution clause, which prohibited the parties from pursuing litigation outside Germany.⁵⁶ Accordingly, the German Federal Court held that under the governing German law, Deutsche Telekom was entitled to recover the costs it incurred as a result of the litigation in the United States.⁵⁷ This

48. See Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, THE N.Y. TIMES (Mar. 26, 2008), <https://www.nytimes.com/2008/03/26/us/26punitive.html>.

49. See Press Release, Cogent Comms., Cogent Communications Sues Deutsche Telekom for Congesting Internet Connections (Dec. 8, 2015), https://www.cogentco.com/files/docs/news/press_releases/Cogent_Sues_Deutsche_Telekom_for_Congesting_Internet_Connections.pdf.

50. See *id.*

51. *Id.*

52. See *Deutsche Telekom Can Fight Cogent Contract Row in Germany*, LAW360 (May 13, 2016), <https://www.law360.com/articles/796011/deutsche-telekom-can-fight-cogent-contract-row-in-germany>.

53. Press Release, German Federal Supreme Court, Damage Claim Upon Breach of a Venue Clause by Filing a Claim Before a US Court (Oct. 17, 2019), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0134/19.

54. See *id.* at ¶ 7.

55. See *id.*

56. See *id.*

57. See *id.* at ¶ 1.

decision gives German companies some comfort that they will be able to obtain recourse if a U.S. party files an action in the United States in violation of a forum selection clause providing for litigation in Germany.

VII. Israel

The year 2019 continued to be active for M&A in Israel, with significant transactions in a wide range of business sectors, including Israel's highly regarded hi-tech ecosystem, as well as in regulated financial services industries and other traditional business fields. Both domestic and multinational players were involved in notable acquisitions, keeping the market strong. Although there were no substantial changes in the M&A legal environment, this end-of-year review highlights two developments in related fields that can bear significantly on M&A transactions.

A. TAXATION OF DEFERRED CONSIDERATION

In December 2018, the Israel Tax Authority issued Income Tax Circular 19/2018, which clarified the rules for reporting and taxation of future consideration—whether fixed or contingent—in the sale of rights in corporate entities.⁵⁸ Under the Israeli Income Tax Ordinance, the date that an agreement for the sale of interests in a corporate entity is signed is generally considered the moment at which the sale agreement crystallizes and triggers tax-reporting and payment obligations with respect to the transaction. In view of the cash-flow and measurement difficulties that this approach creates when applied to transactions involving payments of deferred consideration, the Circular sets out a series of principles to facilitate the reporting and payment of taxes of such transactions in a manner consistent with their form:

- When a transaction includes a fixed portion of deferred compensation, it is treated as a transaction for the aggregate consideration discounted back from the deferred payment date(s) to the signing date at the statutory interest rate, with the difference between the total consideration and the discounted amount treated as financing income to the seller;
- When a portion of the transaction consideration is paid into escrow as security for the seller's representations, the seller may, in certain situations, request to defer the tax on the escrowed amount until after the release from escrow, but the seller will be required to add interest and indexation;
- In case of fixed deferred consideration denominated in non-Israeli currency, the seller may, in certain circumstances, be allowed to apply

⁵⁸ See Israeli Tax Authority, *TAX CIRCULARS AND GENERAL DIRECTOR GUIDELINES*, Income Tax Circular No. 19/2018, at 1–2 (2018), <https://www.gov.il/he/departments/policies/income-tax-professional-inst-19-2018>.

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the exchange rate at the date of the future payment, rather than at the date of sale; and

- In some situations, taxation of contingent deferred compensation can be deferred until it becomes certain or is actually paid, whichever occurs earlier. In this case, the seller's cost basis is attributed entirely to the fixed portion of the consideration that is taxed in connection with the signing.⁵⁹

B. DEVELOPMENTS IN COMPETITION LAW

On January 1, 2019, the Israeli Parliament approved an amendment to Israel's principal antitrust law, the Economic Competition Law.⁶⁰ Two aspects of the amendment are particularly relevant for M&A practitioners.

First, the definition of "monopolists"—a designation that entails certain limitations under the Economic Competition Law—was broadened to include entities that hold "significant market power," even if their relevant market share is less than fifty percent.⁶¹ Guidelines issued by the Israeli Competition Authority define "significant market power" to include the ability of a supplier or customer to determine terms and conditions of commercial agreements that significantly benefit them and are not common in the market.⁶² Notably, entities that meet the expanded "significant market power" definition, but whose market share remains below fifty percent, are not considered monopolists for purposes of the triggering requirements for the filing of merger notices with the Competition Authority.⁶³

Second, the minimum combined Israeli sales turnover of entities of parties to a merger transaction for which a merger notice must be filed was increased from NIS 150 million to NIS 360 million.⁶⁴ The Competition Authority also issued proposed regulations that would increase the minimum Israeli sales turnover threshold of at least two parties to a merger transaction for which a merger notice must be filed from NIS 10 million to NIS 20 million.⁶⁵ These changes will help reduce the bureaucratic burden for relatively small or mid-market acquisition transactions in Israel.

⁵⁹. See *id.* at 4-9.

⁶⁰. See Economic Competition Law, 5748 – 1988, SB No. 1258 p. 128 (Isr.).

⁶¹. See *id.* § 26.

⁶². See *Israel: Watchdog Publishes Draft Guidance Paper on Significant Market Power*, COMPETITION POL'Y INT'L (Feb. 13, 2019), <https://www.competitionpolicyinternational.com/israel-watchdog-publishes-draft-guidance-paper-on-significant-market-power/>.

⁶³. See Shai Bakal & Roi Krause, *Israel Parliament Approves a Major Reform to the Antitrust Law*, TADMOR LEVY (Jan. 2, 2019), <https://tadmor.com/media-item/israel-parliament-approves-a-major-reform-to-the-antitrust-law/>.

⁶⁴. See Economic Competition Law § 17.

⁶⁵. Legal Update, FBC & Co., Competition & Antitrust (Aug. 2019), <https://www.fbclawyers.com/news/legal-update-competition-antitrust-august-2019-hebrew/>.

VIII. Italy

A. RUSSIAN ROULETTE CLAUSES UNDER ITALIAN LAW

Russian roulette clauses, under which a party offers the other side to either buy that party's shares or sell its own shares, are often inserted in shareholders or similar agreements to resolve deadlock situations.⁶⁶ In Italy, these clauses were controversial, and their validity was debated, because a Russian roulette clause may leave the evaluation of the shares to the discretion of the offering party and may also be considered a way to extend the duration of a shareholders' agreement beyond the mandatory maximum five-year term set by Italian law.⁶⁷

In two recent decisions, the Court of Rome and the Notaries District of Milan ruled that the Russian roulette clause complies with Italian law and is a legitimate way to resolve a deadlock situation.⁶⁸ The Court of Rome reasoned that the Russian roulette clause (1) may avoid a time consuming and costly liquidation procedure of the company; (2) provides for a balanced way to resolve a deadlock; and (3) does not leave the calculation of the price of the shares entirely to the discretion of the first party serving the notice to sell its shares, as the other party can decide to either purchase or sell the shares. The Court of Rome further ruled that the Russian roulette clause does not violate to the so-called *divieto di patto leonino*,⁶⁹ which prohibits agreements to exclude some shareholders from their stake in the company's profits or losses, because the clause operates only upon occurrence of deadlock or similar situations and the sales price of the shares is not pre-established at the time the agreement is signed. The College of Notaries of Milan also declared the Russian roulette clause to be valid, provided that the price proposed by the party exercising the clause is not arbitrary, but rather calculated through a balanced assessment (*equa valorizzazione*)⁷⁰ that resembles the process for withdrawal of a shareholder from a company.

66. See *Russian Roulette – The Clause for Deadlock Situations*, LEGALMONDO (Jan. 24, 2019), <https://www.legalmondo.com/2019/01/russian-roulette-clause-for-deadlock-situations/>.

67. See Gianmatteo Nunziante & Francesco Vitali de Bonda, *Joint Ventures in Italy: Overview*, NUNZIANTE MAGRONE, at 7 (Aug. 1, 2017), [https://uk.practicallaw.thomsonreuters.com/Cosif/SignOn?redirectTo=%2f2-617-2715%3f_lrTS%3d20180313022359750%26transitionType%3dDefault%26contextData%3d\(sc.Default\)%26firstPage%3dtrue](https://uk.practicallaw.thomsonreuters.com/Cosif/SignOn?redirectTo=%2f2-617-2715%3f_lrTS%3d20180313022359750%26transitionType%3dDefault%26contextData%3d(sc.Default)%26firstPage%3dtrue).

68. See Tribunale di Roma, sez. tre, 19 ottobre 2017, n. 19708/2017 (It.); *Massima* no. 181 NOTARIES DISTRICT OF MILAN (July 9, 2019), <https://www.consiglionotarilemilano.it/notai/massime-commissione-societa.aspx>.

69. See Nunziante, *supra* note 67, at 8.

70. See Anna Realmuto, *Is the Russian Roulette Clause Legitimate?*, AR LAW (Jan. 4, 2020), <https://www.arlawpractice.com/is-the-russian-roulette-clause-legitimate/>.

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IX. Mexico

**A. POSITIVE OUTLOOK FOR M&A TRANSACTIONS DESPITE
POLITICAL AND ECONOMIC UNCERTAINTY**

Since the current government—which ran on a platform of radically changing laws and public agencies—took office on December 1, 2018, political and economic unpredictability have increased.⁷¹ Despite the atmosphere of instability, in 2019 M&A transactions in Mexico reduced in quantity, but resulted in more mobilized capital compared to 2018.⁷² According to the October 2019 report of Transactional Track Record, the M&A market in Mexico closed its first nine months of the year with 240 transactions and with USD 13.574 million in mobilized capital.⁷³ The same report from October 2018 stated that 270 transactions took place in that year, adding up to USD 11,448 million in mobilized capital.⁷⁴

The International Monetary Fund projects an economic growth rate of 0.4 percent in 2019.⁷⁵ The reduction compared to last year's two percent has been attributed mainly to political and economic uncertainty.⁷⁶ Among the factors that contribute to the uncertainty is the reduction of the funding the government allocates to certain government agencies, including the Department of Foreign Relations and the Ministry of Finance and Public Credit.⁷⁷ Other factors include the abrupt suspension of various projects such as investment in Mexico City's airport, energy contracts granted by the State-owned oil and gas company (Pemex), and the construction of the Mayan train.⁷⁸

The unpredictability is offset to some extent by factors that make M&A and joint venture transactions in Mexico appealing, such as attractive investment projects, the new government's fight against corruption, and the

71. See Azam Ahmed & Kirk Semple, *A New Revolution? Mexico Still Waiting as Lopez Obrador Nears Heal-Year Mark*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/world/americas/amlo-mexico-lopez-obrador.html>.

72. See TRANSACTIONAL TRACK REC., MEXICO: QUARTERLY REPORT 3 (Q4 2018), <https://www.ttreCORD.com/en/publications/market-reports/monthly-report-mexico/Mexico-4Q-2018/1850/>.

73. See TRANSACTIONAL TRACK REC., MEXICO: MONTHLY REPORT 1 (Oct. 2018), <https://www.ttreCORD.com/en/publications/market-reports/monthly-report-mexico/Mexico-October-2019/1912/>.

74. See TRANSACTIONAL TRACK REC., *supra* note 72, at 3.

75. See Press Release, Int'l Monetary Fund, IMF Executive Board Concludes 2019 Article IV Consultation with Mexico (Nov. 5, 2019), <https://www.imf.org/en/Publications/CR/Issues/2019/11/05/Mexico-2019-Article-IV-Consultation-Press-Release-and-Staff-Report-48788>.

76. See *id.* at ¶ 2.

77. See *Public Finances and Public Debt as of November 2018*, SECRETARIA DE HACIENDA Y CREDITO PUBLICO (Dec. 12, 2018) (Mex.), https://www.finanzaspublicas.hacienda.gob.mx/work/models/Finanzas_Publicas/docs/ori/Ingles/Monthly_Report/2018/November.pdf.

78. See Daniel Zaga et al., *Mexico: Economic Slowdown Likely to Continue in 2020*, DELOITTE (2019), <https://www2.deloitte.com/us/en/insights/economy/americas/mexico-economic-outlook.html>.

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lack of increases in this year's federal taxes.⁷⁹ As a result, the outlook for Mexico's short-term economic growth is generally positive.⁸⁰

Notably, the developments discussed here have affected investors' approaches to M&A and joint venture transactions in Mexico. For example, parties to such transactions often make gradual investments to test out investing in Mexico before making a large commitment.⁸¹ These strategies contribute to the continued success of M&A and joint venture transactions in Mexico.

X. Peru

A. PRIOR CLEARANCE REQUIREMENTS FOR BUSINESS CONCENTRATION TRANSACTIONS

On November 19, 2019, the Peruvian Government passed an Urgent Decree, which imposes merger control requirements through the establishment of prior control of business concentration transactions.⁸² The Urgent Decree will enter into force in August 2020, and its regulations are expected to be approved within six months.⁸³ Prior to the Urgent Decree, only the energy industry was subject to control obligations in Peru.⁸⁴

The Urgent Decree applies to business concentration transactions that (1) exceed certain thresholds;⁸⁵ and (2) may eventually produce negative effects in the market, regardless of where the transactions have taken place. The requirement of prior clearance is triggered by business concentration transactions that effect a permanent change of control.⁸⁶ The requirement of prior clearance applies to all agents intervening in the business control transaction in merger transactions and to the purchaser in the case of acquisitions of control. Any acts within the scope of the Urgent Decree that are carried out without complying with prior clearance can be voided and the responsible parties may be subject to fines and corrective measures.⁸⁷

^{79.} See *id.* at 8.

^{80.} See *id.*

^{81.} See Jose Torres, et al., *Corporate M&A 2020: Mexico*, CHAMBERS AND PARTNERS (Apr. 20, 2020), <https://practiceguides.chambers.com/practice-guides/corporate-ma-2020/mexico>.

^{82.} See Emergency Decree No. 013-2019 art. 1, Noviembre 18, 2019 (Peru), available at <https://busquedas.elperuano.pe/normaslegales/decreto-de-urgencia-que-establece-el-control-previo-de-opera-decreto-de-urgencia-n-013-2019-1828320-1/>.

^{83.} See Pierino Stucchi, *Ni Urgente ni Necesario: El Decreto que Aprueba el Control Previo de Fusiones y Adquisiciones Empresariales* [Neither Urgent Nor Necessary: The Decree That Approves the Prior Control of Mergers and Business Acquisitions], GESTION (Nov. 19, 2019), <https://gestion.pe/blog/reglasdejuego/2019/11/ni-urgente-ni-necesario-el-decreto-que-aprueba-el-control-previo-de-fusiones-y-adquisiciones-empresariales.html/> (Peru).

^{84.} See *id.*

^{85.} See Emergency Decree No. 013-2019, at art. 2.

^{86.} See *id.* at art. 3.

^{87.} See *id.* at art. 32.

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The prior clearance process is divided into four stages, which may take between 130 and 385 business days to complete.⁸⁸ Each stage is subject to affirmative administrative silence after the corresponding term expires. If the Peruvian Antitrust Authority determines that the business control transaction may negatively affect the market, it may (1) authorize the business control transaction, provided that the economic efficiencies of the deal outweigh any restrictions to competition; (2) authorize the business control transaction subject to conditions imposed to mitigate adverse competition effects; or (3) deny authorization for the business control transaction, if it determines that the economic efficiencies do not compensate for significant restrictions to competition and possible negative effects on the market cannot be mitigated through conditions.⁸⁹

XI. Poland

A. AMENDMENTS TO BUSINESS ORGANIZATIONS LAWS

Recently, there have been quite a few amendments to the laws governing Polish business organizations, primarily the Polish Commercial Companies Code (PCCC).⁹⁰ These changes aim to make Polish business organizations more transparent and up to date.

With regard to limited liability companies (a common organization form for investments), shareholders can now participate in shareholders' meeting through electronic means of communication.⁹¹ Although shareholders' meetings must still take place within Polish territory, the amendment makes it easier for foreign shareholders to participate.⁹²

In 2019, the Polish legislature also introduced regulations intended to clarify and standardize some issues that had caused practical problems.⁹³ Among other things, the regulations: specify the dividend date and dividend payment day;⁹⁴ prescribe that the last member of the management board to resign must submit the resignation at the shareholders' meeting;⁹⁵ specify that a company has an obligation to return a prepayment against an expected dividend when the company recorded a loss or earned a profit of less than the prepayment made;⁹⁶ provide for the possibility of cancelling

88. *See id.* at art. 21.

89. *See id.* at art. 7.

90. *See* Commercial Companies Code of 15 September 2000 Section 585.1 (Polish Journal of Laws no. 94, item 1037) (Pol.) [hereinafter Commercial Companies Code]; *see also* *Doing Business in Poland*, BAKER MACKENZIE (2016), https://www.bakermckenzie.com/-/media/files/expertise/ma-resources/Doing_Business_in_Poland_2016.pdf.

91. *See* Commercial Companies Code art. 402.

92. *See id.* at art. 234.

93. *See* *Doing Business in Poland*, *supra* note 90, at 13.

94. *See* Commercial Companies Code art. 193 §§ 3–4.

95. *See id.* arts. 202 § 6, 383.

96. *See id.* art. 195 § 1.

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shareholders' meeting, which previously was not possible;⁹⁷ and provide for joint and several liability for obligations assigned in the division plan to the recipient company or the new company during the process of division of companies.⁹⁸

Lastly, the legislature passed significant regulations that will become effective in 2020, including most notably the introduction of the simple joint stock company.⁹⁹ This new type of business organization is intended to facilitate economic activity relating to innovations and new technology, especially start-ups. The simple joint stock company provides protection from personal liability for the company's debts if bankruptcy is filed in time and promotes flexibility in creating and managing the company.¹⁰⁰ In addition to these features, the simple joint stock company is attractive because knowledge and skills can qualify as a contribution.¹⁰¹

In sum, the Polish legislature continues to update Poland's business organization laws in order to create an investor-friendly environment.

XII. Russia

A. DEVELOPMENT IN ARBITRABILITY OF CORPORATE DISPUTES

In Russia, the most important developments in 2019 related to the arbitrability of corporate disputes involving Russian companies, an issue that has been the subject of heated debate in the legal community since 2015.

As a practical matter, during 2019, two prominent foreign arbitration institutions—the Hong Kong and Vienna Arbitration Centres (HKIAC and VIAC, respectively)—obtained the status of permanent arbitration institution in Russia, entitling them to administer corporate disputes.¹⁰² But, because neither HKIAC nor VIAC has presently set up a subdivision in Russia, the two arbitration institutions are entitled to administer only cross-border disputes, i.e., disputes with a foreign element.¹⁰³ Additionally, because neither of the arbitration institutions deposited the arbitration rules governing corporate disputes, their authority is limited to disputes that can be administered without such arbitration rules.

97. *See id.* art. 240.

98. *See id.* art. 546 § 1.

99. *See* Miroslaw Cejmer & Bartłomiej Pobożniak, *Simple Joint Stock Company Introduced to Commercial Companies Code*, INT'L L. OFF. (Oct. 7, 2019), <https://www.internationallawoffice.com/Newsletters/Corporate-Commercial/Poland/Kubas-Kos-Gakowski/Simple-joint-stock-company-introduced-to-Commercial-Companies-Code>.

100. *See* Krzysztof Libiszewski, *The Simple Stock Company*, IN PRINCIPLE (Aug. 1, 2019), <http://www.codozasady.pl/en/the-simple-stock-company/>.

101. *See id.*

102. *See* Desiree Prantl et al., *VIAC Becomes the Only European Arbitral Institution with 'Permanent Arbitration Institution' Status in Russia*, CIS ARB. FORUM (Sept. 11, 2019), <http://www.cisarbitration.com/2019/09/11/viac-becomes-the-only-european-arbitral-institution-with-permanent-arbitration-institution-status-in-russia/>.

103. *See id.*

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Additionally, the Russian legislature introduced amendments to the Federal Law No. 382-FZ, dated December 29, 2015, titled “On Arbitration in the Russian Federation.”¹⁰⁴ First, permanent arbitration institutions are no longer required to deposit arbitration rules for corporate disputes in order to administer disputes arising out of shareholders’ agreements.¹⁰⁵ As a result, HKIAC and VIAC may now administer cross-border disputes arising out of shareholders’ agreements. Second, the law now requires that only the parties to the disputed shareholders’ or transaction agreement be signatories of the arbitration agreement.¹⁰⁶ Before the amendments became effective, corporate disputes could be submitted to arbitration only if all shareholders of the Russian company, the Russian company itself, and other persons involved in the dispute were the parties to arbitration agreement. These requirements were particularly onerous when some, but not all, shareholders entered into a shareholders’ agreement. Although these developments have a favorable effect on arbitration of corporate disputes in Russia, the amendments were not introduced in accordance with the Russian Arbitration Procedure Code.¹⁰⁷ As a result, it is uncertain how Russian courts would rule on the validity of the amendments.

The entry of two internationally recognized arbitration institutions and the amended Law on Arbitration should make it easier to submit corporate disputes to arbitration.

XIII. Saudi Arabia

A. NEW REGULATIONS REGARDING APPROVALS OF JOINT VENTURES

The issuance of the new Competition Decree¹⁰⁸ and its Executive Regulations¹⁰⁹ in 2019, which significantly amend Saudi Arabia’s merger control regime, constituted the first significant development that impacts joint ventures in the Kingdom since the issuance of a new Commercial Companies Law in 2015. The formation of joint ventures, whether unincorporated or in the form of an equity joint venture, are subject to Saudi

104. See [Federal Law ‘On Arbitration in the Russian Federation’], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 31, 2015, *available at* <https://rg.ru/2015/12/31/arbitrazh-dok.html>; *see also* [Federal Law on Amending the Federal Law on Arbitration in the Russian Federation and the Federal Law on Advertising], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 27, 2018, *available at* <https://rg.ru/2018/12/29/reklama-dok.html>.

105. See Federal Law on Amending the Federal Law on Arbitration in the Russian Federation and the Federal Law on Advertising.

106. *See id.*

107. *See id.* at 1.

108. See Royal Decree M/75 of 29/6/1440 A.H. (March 6, 2019), art. 2 (Saudi Arabia) [hereinafter Competition Decree].

109. See Resolution of the Administrative Board 337 of 25/1/1441 A.H. (Sept. 24, 2019), art. 2 (Saudi Arabia), *available at* https://gac.gov.sa/pdf/comp_law_regulations.pdf [hereinafter Executive Regulations].

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Arabia's competition regime.¹¹⁰ Whenever the envisaged joint venture's market share or turnover would exceed the thresholds determined by Saudi Arabia's competition regulations, the proposed joint venture must be notified to the competition authorities, which will determine whether to approve the transaction.¹¹¹

The new legislation expands the old regime's procedures for notification and approval. In particular, the Executive Regulations, for the first time, provide detailed descriptions of the competent authority's approval process as well as a basic catalogue of parameters that govern the assessment.¹¹² Still, the merger control provisions remain rudimentary. Additionally, having dealt with few complex merger control procedures, Saudi Arabia's authorities are comparatively inexperienced.¹¹³ Therefore, notification of a transaction that may require merger control approval should include substantial documentation on the relevant transaction and its possible impact on and benefits for the Saudi Arabian market. Close cooperation with the competent authorities is essential to obtaining a swift and well-informed decision on a request for approval.

The introduction of a turnover-based threshold is arguably the most significant amendment introduced by the new merger control regime. Under the old merger control regime, notification was required if the merging parties' share of a specific market exceeded the thresholds defined by the statutes. The new regime requires notification for any transaction in which the combined domestic turnover of all parties involved exceeds 100 million Saudi Riyal.¹¹⁴ This is a relatively low threshold, requiring notification even for smaller transactions.

It remains to be seen whether future regulations and guidelines issued by the competent authorities will establish additional criteria for notification, such as market impact of the proposed venture. But conversations with officials of the General Authority for Competition suggest that such limitations of the turnover-based threshold will likely not be forthcoming.¹¹⁵ Consequently, we expect a steep rise in notifications.

110. See Competition Decree, *supra* note 108, at art. 1.

111. See *id.*

112. See Executive Regulations, *supra* note 109, at art. 19.

113. See, e.g., Dr. Ahmed Al Ajlouni, *Potential Drivers for the Saudi Capital Market*, EUREKA HEDGE (July 2013), <https://www.eurekahedge.com/Research/News/162/Potential-Drivers-For-The-Saudi-Capital-Market>.

114. See Executive Regulations, *supra* note 109, at art. 12.

115. See Jad A. Taha et al., *Saudi Arabia: Broad Applications of the Competition Law and Merger Control Rules*, MAYER BROWN, <https://www.mayerbrown.com/en/perspectives-events/publications/2020/03/saudi-arabia-broad-applications-of-the-competition-law-and-merger-control-rules> (last visited on June 2, 2020).

XIV. Spain

A. DEVELOPMENTS IN CORPORATE LAW

The legislative activity in Spain in the last year has been unusually limited due to the absence of a stable majority in the Spanish parliament. But the Spanish Supreme Court has issued two noteworthy decisions.

First, in judgment number 187/2019 of March 27, 2019, regarding a contract for sale of a company through a share purchase transaction, the Court confirmed that the company being acquired could be the subject of the agreement, rather than only its shares.¹¹⁶ The agreement's provisions regulating the relationship between the parties (contingencies, warranties, etc.) do not require a different conclusion. The Court also held that, unless the agreement provides otherwise, if the seller conceals the company's true financial situation, the purchaser has the option to: rescind the purchase agreement (and hold the seller liable for the expenses incurred); reduce the purchase price by a proportional amount; or claim the relevant damages.¹¹⁷ Lastly, in view of the terms in the purchase agreement to which the parties freely agreed, the Court ruled that the doctrine of unjust enrichment does not limit indemnification for loss and damage sought by the purchaser.

Second, in judgment number 190/2019 of March 27, 2019, the Court allowed a limited liability company's acquisition of its own shares when the transaction constitutes merely an intermediate and instrumental step to permit the transfer of such shares to other shareholders in the context of the distribution of an estate.¹¹⁸

Another noteworthy development in Spanish corporate law involves the issuance of three resolutions by the Directorate General of Registries and Notaries:

- The Resolution of November 7, 2018, which permits registration of bylaw provisions that prohibit shareholders from granting pledges on shares;¹¹⁹
- Two Resolutions issued on, respectively, November 8 and December 12, 2018 in very similar cases, which stress that a contract between a board member with executive functions and the company is compatible with the provision that such executive functions be performed free of charge;¹²⁰

116. See Alex Paluzie, *Indemnification for R&W, STS 187/2019 of March 27, 2019*, BETWEEN L. & JURIS. (Apr. 13, 2019), <https://translate.google.com/translate?hl=en&sl=es&u=http://www.leyesjurisprudencia.com/2019/04/indemnizacion-por-r-sts-1872019-de-27.html&prev=search>.

117. See S.T.S., Mar. 27, 2019 (R.J., No. 187) (Spain).

118. See S.T.S., Mar. 27, 2019 (R.J., No. 190) (Spain).

119. See Resolution 16311, p. 116605 (B.O.E. 2018, 288) (Spain).

120. See Resolution 16317, p. 116650 (B.O.E. 2018, 288) (Spain).

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- The Resolution of March 7, 2019,¹²¹ which prohibits the removal of the directors of a company on the basis that the dissolution of that company is delayed until after liquidation has begun; and
- The Resolution of May 9, 2019,¹²² which clarifies that corporate bylaws may provide that in the event the company itself acquires attached shares, the fair value of such shares is the book value according to the last balance sheet approved by the shareholders' meeting.

121. *See* Resolution 4991, p.34830 (B.O.E 2019, 81) (Spain).

122. *See* Resolution 8190, p.57922 (B.O.E 2019, 131) (Spain).

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