International M&A and Joint Ventures Committee Newsletter

April 8, 2019

Editor's Note:

As usual, we issue this Newsletter in conjunction with the 2019 Annual Meeting to be held in Washington D.C. from April 9 to 13. One year has passed since the issuance of the Committee's last Newsletter, given the ABA SIL's elimination of the Fall Meeting from the ABA SIL's annual meeting schedule. Going forward, in addition to issuing a spring Newsletter in conjunction with the Annual Meeting, we welcome the initiative of any Committee members who wish to propose and take a lead role in issuing one or more additional Newsletters during the intervening period.

This Newsletter follows the format of Newsletters past, with the addition of a second section containing short reports on Committee events held at ABA SIL regional fora held between Annual Meetings – in this case at the ABA SIL Mexico City conference held in November, 2018 and at the ABA SIL Seoul conference held in October, 2018.

The current edition of the Newsletter saw a slightly lower number of submissions, eight in total (down from 12), of which four are from Europe, one is from North America, two are from Latin America, and one is from Asia. Topics covered by the submissions again varied considerably, with a wide variety of regulatory changes being somewhat a common theme.

Please see below for further information on our Committee's substantive program for the upcoming the ABA SIL's Annual Meeting in Washington D.C. For further information, there is a comprehensive on-site brochure you can download in the ABA web page dedicated to the 2019 Section of International Law Annual Meeting (you can be directed to this page by typing the following link to your web browser https://www.americanbar.org/events-cle/mtg/inperson/339174137/).

I hope you enjoy reading this newsletter and ABA SIL's Annual Conference in Washington D.C.

Eric D. Kuhn

IN THIS ISSUE

ANNUAL CONFERENCE SUBSTANTIVE PROGRAM

WEDNESDAY, APRIL 10, 2019

9:00 AM – 10:30 AM CLE PROGRAM: WHEN A CORPORATION BECOMES CRIMINAL – THE IMPACT OF CORPORATE CRIMINAL LIABILITY ON INTERNATIONAL M&A TRANSACTIONS.

In the context of expanded enforcement and considerable penalties imposed on corporations by an increasing number of countries across the globe, most recently in Latin America, the advisors on M&A transactions need to take into account the risks and impact of corporate criminal liability. Speakers from the U.S., UK and other major jurisdictions will flesh out the relevant laws and underlying concepts, comparing differing national approaches to corporate criminal liability. This discussion will include an overview of the powers and penalties available to prosecutors and the possible defenses for the companies concerned. Then, the panel will address the potential for successor liability and what a buyer can do to avoid or mitigate these risks, e.g. through appropriate due diligence, insurance, or contractual terms. The panel will discuss different fact patterns and available remedies, including scenarios where due diligence reveals potential criminal conduct, where a target corporation discloses that it is already under criminal investigation but that investigation is ongoing, and where a corporation or its officers have already been convicted and fined. This panel will also cover due diligence as to criminal liability and compliance risks and how the results of such diligence should be reflected in the negotiating and drafting process.

Panel Chairs and Moderators:
Hermann Knott, Andersen Tax & Legal, Cologne, Germany
Marshall Miller, Wachtell Lipton, New York, NY
Speakers:
Neill Blundell, MacFarlanes, London, England
Fabyola En Rodrigues, Demarest, Sao Paulo, Brazil
Jennifer R. Downing, BNP Paribas, New York, NY

2:30 PM - 4:00 PM CLE PROGRAM: SO WHERE DOES YOUR COUNTRY STAND? INTERNATIONAL APPROACHES TO THE LEGALIZATION OF CANNABIS AND CHALLENGES FOR CROSS-BORDER TRANSACTIONS.

It is legal in Canada and Uruguay. In the EU many member states have legal medical marijuana regimes or have passed laws decriminalizing the recreational use of cannabis. The U.S.? Well it depends on who you ask and where you live. While countries as Colombia and Mexico, that have long suffered death and corruption due to drug dealing, are trying to attract foreign investment into a still stigmatized industry, others as Argentina and Uruguay are opening to receive the benefits of cannabinoids. In the context of an increased move toward legalization of cannabis in many jurisdictions and a variety of regulatory approaches, governments, businesses and consumers can face a minefield of rules and approaches to cannabis.

A comparative law (and practical) review will give the audience a glance at the nuances of doing business cross-border in the growing and interesting cannabis industry.

Many cannabis companies claim to provide relief to some of the most debilitating diseases and want to bring their controlled product to as many people as possible. Certainly, there is recognition that cannabis use (both recreational and medical) is a multi-billion dollar industry and consumers want clarity. Meanwhile global investment is chasing the opportunities. The Toronto Stock Exchange has many cannabis companies with billion dollar market caps. Major companies in low growth industries such as alcohol and tobacco are investing in cannabis companies. Massive cannabis companies in California and Colorado look for ways to expand their market and reach beyond the U.S.

Speakers from Canada, the U.S., South America and the EU will update the audience on the approach in their particular jurisdiction and review how international investors are conducting cross-border transactions. This panel will also cover recent developments and issues in the United States at both the State and Federal levels with regard to cannabis.

Panel Chair and Speaker: Gordon Cameron, Bennet Jones, New York, NY
Panel Chair and Moderator/Speaker: Santiago Concha, C&R Law, Bogota, Colombia
Speakers:
Mitzi Hensley Vaughn, Alto Terra Capital Partners Ltd, New York, NY
Giorgio Gallenzi, Grimaldi, Studio Legale, Rome & Milan, Italy

There are also a number of other sessions in which our Committee is a co-sponsor. Please check the program of the Annual Conference for details.

Our Committee Breakfast will be held on Wednesday April 10, from 8:00 a.m. to 9:00 a.m. at the Capital Hilton Hotel.

Our Committee Business Meeting will be held the same day, from 4:00 p.m. to 5:00 pm. at the Statler Room, Capital Hilton Hotel. This business meeting is an excellent opportunity to plan future activities. You are strongly encouraged to attend.

Finally, our Committee Dinner will be held on Thursday April 11, from 8:00 p.m. to 10:00 p.m. at P.J. Clarke's, 1600 K Street NW, Washington DC. Please note this dinner is organized by our committee and not included with the registration fee. Make your reservation today. Only those with a pre-purchased ticket will be allowed to attend.

Register here: https://www.eventbrite.com/e/aba-international-ma-jv-committee-dinner-washington-dc-tickets-59357779717?aff=utm_source%3Deb_email%26utm_medium%3Demail%26utm_campaign%3Dnew_event_email&utm_term=eventurl_text

The price for the dinner all included (i.e., food, wine, taxes, tips and service fees) is $145 plus the Eventbrite fee.

COUNTRY UPDATE ON ARGENTINA

Foreign Companies in Argentina: Significant Changes; Simplified Registration

by Vanesa Balda, Partner at Vitale, Manoff & Feilbogen.

Foreign companies are welcome in Argentina, with full ability to set up and own companies and to participate in any kind of business activities.

To conduct business on a regular and permanent basis, a foreign company may:

(a) establish a branch;
(b) form a local entity; or
(c) become a stakeholder in an existing local entity.

In all cases, the foreign company must register with the Public Registry of Commerce.

Since August 30, 2018, the registration of foreign companies has been greatly simplified by the General Inspectorate of Justice ("IGJ"), which is the agency in charge of the Public Registry of Commerce in the City of Buenos Aires.

On August 29, 2018, General Resolution No. 6/2018 was published in the Official Gazette. Such resolution amends IGJ's General Resolution No. 7/2015, which, effective August 30, 2018, establishes the requirements for the registration of foreign companies carrying out business in Argentina. The following are the most salient changes for foreign companies filing for registration with the IGJ:

(i) Foreign companies no longer have to show evidence of assets or significant economic activities abroad.
(ii) Foreign companies no longer have to disclose their beneficial owners.
(iii) The mandatory annual information regime has been abolished. Foreign companies currently registered with the IGJ will not need to disclose annually their assets, business activities and partners.

As an exception to the above, under Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) policies the IGJ requires that companies formed in jurisdictions considered non-cooperative for tax transparency purposes provide proof of the existence of significant economic activity abroad. It is expected that the IGJ will review actively such documentation and information submitted by such companies.

The following is the updated list of documents and information that a foreign company must file with the IGJ to register as a foreign company where the foreign company establishes a branch (Section 118 of the Companies Law) or forms or become a stakeholder of a local entity (i.e., a subsidiary, under section 123 of the same Law):

(A) Bylaws and articles of incorporation, with amendments and related documents.
(B) Certificate of good standing, issued by the relevant authority stating that the foreign company is duly organized and existing under the laws of its country of origin.
(C) Copy of the resolution by the relevant corporate body: (1) approving the decision of the foreign company to be registered in Argentina; (2) appointing a representative; and (3) stating that such company is not in winding up and that there is no legal proceeding pending encumbering such company's assets and/or activities.

All documentation submitted for these purposes must be duly authenticated in the country of origin and must be legalized by the Argentine Consulate or the Ministry of Foreign Affairs. This legalization may be replaced by the Apostille implemented by the *Convention de La Haye du 5 octobre 1961*.

COUNTRY UPDATE ON CANADA

Canadian Mining M&A: Pedal to the Metal in 2018 and Beyond

by Jason Saltzman, Partner at Borden Ladner Gervais LLP.

The Trend

In the last half of 2018 and early into 2019, a few new deals have injected fuel into Canadian mining M&A. The trend has been continued growth for the major players, but will that continue throughout 2019? Grant Kernaghan, Citigroup's managing director of Canadian investment banking, seems to think so: "We expect the strong backdrop for mining M&A will continue"[1].

The Deals

Three high-profile transactions created most of the buzz over the past few months in the Canadian mining sector: (i) Barrick Gold Corporation's ("Barrick") acquisition of Randgold Resources Ltd. ("Randgold") for approximately US$6 billion ("Barrick & Randgold"); (ii) Newmont Mining Corporation's ("Newmont") offer to acquire Goldcorp Inc. ("Goldcorp) for approximately US$10 billion ("Newmont & Goldcorp"); and (iii) Barrick's offer to acquire Newmont for approximately US$18 billion ("Barrick & Newmont").

Barrick & Randgold

On September 24, 2018, Barrick announced that it reached an agreement with Randgold to acquire Randgold. On January 1, 2019, the deal closed, creating the world's largest gold company by value and output. Under the terms of the agreement, Barrick offered each Randgold shareholder 6.1280 Barrick common shares for each Randgold common share, valuing the acquisition at roughly US$6 billion. Surprisingly, the deal was closed with essentially no premium paid by Barrick, which is not the norm in Canadian M&A. Jon Case, a metals portfolio manager with Sentry Investments, notes that "the zero-premium template is one the entire gold industry should learn from and possibly enact"[2].

Newmont & Goldcorp

On January 14, 2019, Newmont announced that it had entered into an agreement with Goldcorp to acquire all of the outstanding shares of Goldcorp. The definitive agreement provided that Newmont will acquire each Goldcorp share for 0.3280 of a Newmont share plus $0.02 cash, valuing the transaction at US$10 billion. This transaction has not closed. If it does, the combined entity would have the largest gold reserves and resources in the sector. Many market commentators believe that the offer made by Newmont was a strategic response to Barrick's acquisition of Randgold. Unlike in the Randgold deal, Newmont offered a 17% premium to Goldcorp's share price as at the time of the announcement. After the announcement of the Barrick/Newmont joint-venture discussed below, Newmont shareholders urged the company to renegotiate its deal with Goldcorp as they felt Newmont's value significantly increased as a result of their deal with Barrick. Newmont received consent of Goldcorp to pay its shareholders a one-time dividend worth $470 million, or $0.88/share in recognition of the potential synergy value of the joint-venture on closing of the transaction.

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[1] *Canadian M&A seen rising after hitting 12-year high in 2018,* Reuters, January 4, 2019, https://ca.reuters.com/article/topNews/idCAKCN1OY11Y-OCATP.

[2] *Barrick's no-premium Randgold deal expected to spur more mining M&A in 2019,* The Globe and Mail, December 31, 2018, https://www.theglobeandmail.com/business/article-barricks-no-premium-randgold-deal-expected-to-spur-more-mining-ma-in/

Barrick & Newmont

On February 25, 2019, Barrick announced the launch of a hostile takeover bid to acquire all of the outstanding shares of Newmont. This combination would have created the largest company in the sector, with a combined market capitalization of approximately US$42 billion. The US$18 billion bid provided for an exchange ratio of 2.5695 Barrick shares for each Newmont share, with Barrick shareholders set to own 55.9% of the combined company and Newmont shareholders set to own 44.1%. Similar to Barrick's acquisition of Randgold, the offer did not include any premium; rather, it implied an 8% discount to Newmont's share price as at the time of the announcement. Among other conditions to the bid, the bid was conditioned on Newmont not closing the Goldcorp deal. Newmont's CEO, Gary Goldberg, commented that the bid is a "desperate and bizarre attempt to muddle up our deal"[3] and that "it's certainly not the sort of behavior that will appeal to investors who want to invest in serious, well-run companies"[4]. On March 4, 2019, Newmont's board of directors formally rejected the proposal and, instead, offered Barrick a joint-venture proposal regarding Newmont and Barrick's Nevada related operations. In response, Barrick's board of directors said that the joint-venture proposal reinforced the frustration Barrick has experienced in its efforts to unlock the value in both companies' Nevada assets. Notwithstanding some unfriendly back and forth, on March 11, 2019, Barrick's hostile takeover bid ended as Barrick and Newmont announced their entrance into a joint venture agreement, which is designed to unlock US$5 billion in Nevada related synergies. Pursuant to the agreement, Barrick will be the operator and hold a 61.5% economic interest and Newmont will hold a 38.5% economic interest. The joint-venture is expected to be completed in the coming months.

Some market commentators have speculated that the Nevada joint venture was secretly Barrick's desired outcome and that the bid was used solely to force Newmont's hand. It will be interesting to observe how their peers and other market participants react to this newly formed alliance. Will the other major players follow the trend and make a move to become larger? One thing is for certain – market participants are hoping that the mining sector will continue to put the *pedal to the metal* in 2019 and beyond.

[3] *Barrick Gold Makes Hostile $17.8 Billion Bid for Newmont Mining,* Bloomberg, February 25, 2019, https://www.bloomberg.com/news/articles/2019-02-25/barrick-gold-makes-hostile-bid-for-newmont-mining.
[4] *Ibid.*

COUNTRY UPDATE ON COLOMBIA

Colombia's Financing Act: M&A Effects

by José Francisco Mafla, Partner at Brigard Urrutia.

The Act 1943 of 2018 (issued on December 28) introduced substantial changes to the Colombian tax regime. As is often the case in the context of tax reforms, M&A practitioners are wondering which of these changes are relevant to the practice. Therefore, with you in mind, we have identified the most relevant points to bear in mind for those of us who work in the world of M&A.

Determination of gross income on sale of shares (Tax Code Section 90)

For the sale of shares of social interest of companies, it is presumed that the sale price cannot be lower than the intrinsic value of the share increased by 30%. The foregoing is a rebuttable presumption.

New Rule for the Indirect Transfer of Assets, Shares and Rights Located in Colombia

The purpose of the new rule is to impose an income tax on the transfer of shares and other types of equity in companies and other foreign vehicles that involve the indirect transfer of assets located in Colombia. The essential elements to trigger this tax are as follows:

(i) The rule applies whenever ownership of equity in a foreign vehicle is sold pursuant to a sale or other transaction and that foreign vehicle owns, directly or indirectly, assets that are deemed to be in Colombia for tax purposes.

(ii) When this occurs, for Colombian tax purposes, the transferor of the shares of the foreign vehicle is deemed to transfer the Colombian assets to the buyer/transferee.

(iii) The transferor is subject to income tax and/or capital gains tax in Colombia on such transfer.

(iv) The tax basis of the assets is the different between the market value of the Colombian assets the tax cost of the vehicle that directly owns Colombian assets.

(v) The transferor must declare and pay income tax and/or capital gains tax on the resulting gain, depending on whether the asset has been owned for less than or more than two years, respectively.

(vi) The income tax return associated with the disposition must be submitted within one month of the date of sale, except when the seller is a Colombian tax resident.

(vii) The rule has two exceptions, where this regime does not apply:

    (a) If the Colombian assets do not represent more than 20% of the book value or the market value of all the assets of the vehicle being sold; or

    (b) If (i) the transfer of equity in the foreign vehicle occurs on a stock exchange recognized by a Colombian Government entity, (ii) if there is an "active" secondary market; <u>and</u> (iii) no single beneficial owner owns more than 20%.

Colombian Holding Companies Regime (CHC)

A special regime was created for Colombian companies whose main purpose is the holding of securities, investment or holding of shares or participations in Colombian and/or foreign entities, and/or the administration of such investments. To be eligible for this regime, at least 10% of the capital of two or more companies must be held for a minimum period of 12 months and must have at least three employees, among other requirements.

(i) Dividends distributed by non-resident entities in Colombia to a CHC are income tax exempted.

(ii) Dividends distributed by a CHC to an individual or legal entity in Colombia are taxed under the ordinary rules (but only upon distribution, whenever Colombian CFC regime does not apply) and those distributed to a non-resident individual or legal entity are considered foreign source income in Colombia.
(iii) The income derived from the transfer of equity in a CHC must be declared as an exempt capital gain, except the portion of profits accrued in Colombia.

Private Equity Funds (PEF) and Collective Investment Funds (CIF)

The scope of application of the deferral principle, which previously applied to PEF and CIF, has been reduced. The realization of income for beneficiaries or participants in a fund will be deferred until the profits are distributed, even if the fund would have accrued the respective income in a different taxable period, only in the following cases:
(i) When the fund's equity is traded on a stock exchange subject to the inspection and oversight of the Superintendence of Finance.
(ii) When no single person, "economically related investment group" or members of the same family up to a 4th degree of consanguinity or affinity who are income tax payers (i) own, directly or indirectly, more than 50% of the fund's equity, or (ii) individually or jointly, has control or discretion over the distributions of the fund.
(iii) A transition regime has been created to keep the existing regime in force until June 30, 2020 for the funds created up to that date.

If the fund's purpose is to defer income tax, the income of the participants will be accrued in the same year in which it is received by the fund, thus complying with the criteria set out above. When income is not deferred, withholding at source is made following the rules of local trusts.

Dividends

A 7.5% tax applies to dividends distributed as non-taxed income to Colombian companies. This tax is only levied at the level of the company receiving the dividends for the first time, and it will be a tax credit that is transferred to the final beneficiary (resident or non-resident). This tax between national companies does not apply to entities that make up a duly registered business group or where the dividend is distributed to a CHC.

The taxed dividends are subject to general income tax rate and, once it has been deducted, to the 7.5% tax on dividends. For individuals, the dividend tax rate is increased from 5% and 10% to 15%.

Finally, a transition regime was established according to which dividends declared as payable until December 31, 2018 maintain the treatment applicable before the effective date of the Finance Act.

Mega Investments within the National Territory

A special regime was created for taxpayers who (i) generate at least 250 direct jobs and (ii) make new investments in Colombia of 30,000,000 UVT or more (COP$1,028,100,000,000 by 2019). The main benefits of the regime are as follows:
(i) Income tax rate of 27%.
(ii) Depreciation of fixed assets in a minimum period of 2 years.
(iii) They would not be subject to presumptive income system.
(iv) They would not be subject to wealth tax.

(v) Additionally, tax stability contracts were established on the new mega investment projects.

This regime does not apply to the evaluation and exploration of non-renewable natural resources.

Thin-capitalization (deduction of interest for loans between related parties)

The thin capitalization rule only applies to interest-bearing loans between economic partners, in which case the average of these debts must not exceed twice the debtor's net worth (2:1). Otherwise, the interest attributable to the excess is not deductible from income tax.

This rule does not apply to the financing of transport and public service infrastructure projects, and to entities supervised by the Superintendence of Finance.

COUNTRY UPDATE ON GERMANY

Even an Acquisition of Only 10% of Voting Rights May Subject an M&A Transaction to Regulatory Review

by Jörg Rehder, Partner at Schiedermair.

Germany has long had a global-based economy – German exports and the "Made in Germany" label enjoy an excellent reputation throughout the world. Simultaneously, foreign investors have long seen Germany as an attractive investment site because of its stable economy, well-educated workforce, high quality companies and products, and low level of corruption. Also, Germany's strong economy is based largely on companies that may not necessarily be the largest, but are well-reputed in their fields. Foreign investors have long viewed these *Mittelstand* entities as attractive potential targets.

Just like in every industrialized country, the acquisition of a company in Germany may be subject to regulatory hurdles. For example, Germany's Foreign Trade Regulation sets forth that Germany's Federal Ministry for Economic Affairs and Energy ("FMEAE") may review, and potentially block, foreign direct investment into Germany if the transaction at issue will impact Germany's public order or national security. Germany recently added significant teeth to its Foreign Trade Regulation – once on July 18, 2017 (the "2017 Amendment") and again on December 29, 2018 (the "2018 Amendment").

2017 Amendment and 2018 Amendment

The 2017 Amendment introduces two categories of transactions that the FMEAE may review – sector-specific transactions and cross-sector transactions.

The first, sector-specific transactions, pertains to the acquisition of entities that manufacture or develop weapons, dual-use goods, encryption technology, or other products used for conflict situations. Under this scheme, if a foreign entity (even from within the European Union) seeks to acquire at least 10% of the voting rights of such a sector-specific entity in Germany, it must notify the FMEAE of the intended transaction (disclosing the identity of the buyer, the domestic target company, as well as each entity's business segments).

As to cross-sector transactions, this category pertains to any number of business segments that may affect Germany's "public order" or "national security". As set forth in Section 55 of Germany's Foreign Trade Regulation, a non-EU based entity's acquisition of more than 10% of the voting rights of a German entity involved in any of the following sectors may trigger a notification requirement:

(i) Critical infrastructure;
(ii) Sector-specific software, including software used in the energy sector, in the water supply industry, whether for drinking or for sewage systems, in the IT or telecommunications industries, in the financing or insurance industry, in the health industry, in the transportation industry, or in the food industry;
(iii) Cloud computing services;
(iv) Equipment used in the telecommunication industry, in particular to monitor telecommunications;
(v) Technology used in the telematics industry; and
(vi) News and media industry.

Has foreign direct investment become politicized in Germany? Yes, most definitely, just like in many other countries.

As discussed below, this stems largely in part to transactions that took place in Germany over the last three or four years involving Chinese buyers. As has been well-documented, Chinese entities, whether conglomerates or state-owned enterprises, have been acquiring companies, technology, know-how, etc. with well-lined purses throughout the world for more than a decade. This has garnered the attention of many politicians, including German politicians. As stated recently by Thorsten Benner, the Director of a Berlin-based think tank: "There used to be a belief that Germany and China were perfectly complementary partners. Now we have realized that China has become a core competitor and that it uses investment in a very strategic manner to copy technology and accelerate the catch-up. And there is a realization that Chinese investment has an impact on national security."

Chinese Investments Are Impetus for Amendments

Two transactions from 2016 served as the impetus for the 2017 Amendment and the 2018 Amendment. First, Beijing Enterprises acquired EEW Energy, a German waste incineration and power generation company, for slightly more than EUR 1.4 billion. Only a few months later, the Midea Group, a Chinese electrical appliance manufacturer, acquired the German robot maker Kuka AG for EUR 4.4 billion. These two transactions raised eyebrows in Germany and directly resulted in Germany amending its foreign direct investment review process. The German legislature concluded that the know-how and technology that German companies had developed over the past decades would soon fall into Chinese hands. It was feared that this would cause Germany not only to lose control over its impressive corporate base, but it would also be a threat to its national security.

Does this mean that Germany is focusing only on acquisitions involving Chinese buyers? No – *any* foreign investment involving more than 10% of a German company's voting rights – including foreign direct investment from the United States –is subject to potential government review.

If a transaction concerns goods used for conflict situations or any of the sectors listed in (i) through (vi), above, then the applicable threshold is the acquisition of 10% of a German company's voting rights. The German government reduced this threshold from 25% to 10% in the 2018 Amendment. As for other acquisitions that may impact Germany's public policy or national security, but do not fall within one of the specific categories discussed above, the threshold to trigger a potential government review remains at 25% of a German company's voting rights. The purchase price itself is irrelevant, meaning even transactions with a low purchase price may be subject to review.

Why was the threshold reduced to 10%? In early 2018, State Grid Corporation of China sought to acquire a 20% interest in 50Hertz, which owns and operates a significant power line network in eastern Germany and around Hamburg, Germany serving approximately 18 million Germans. Because this transaction took place prior to the reduction of the threshold to 10%, it was not subject to governmental review. Even an "only" 20% acquisition in such critical infrastructure, however, left German politicians nervous. As a result, the German government was able to "convince" the KfW, a German state-owned development bank, to acquire the 20% interest at issue. Though this certainly came at a price for German taxpayers, the German government argued this was necessary for security policy reasons.

More recently, in July, 2018, the German government indicated that it would block the acquisition of Leifeld Metal Spinning AG by a Chinese investor (Leifeld produces machinery that allows metals to be formed). This resulted in the Chinese investor walking away from the deal. It is interesting to note that Leifeld, a privately-held entity, has revenues of only about EUR 40 million, but because its machinery is used in the automotive, aerospace, and nuclear energy sectors, it was deemed to be vital to Germany's national security.

European Union Adopts Foreign Direct Investment Regulation

The European Union also recently took action with respect to foreign direct investment. On March 5, 2019, the European Union introduced a mechanism for member states and the European Commission to exchange information and to raise concerns about specific investments taking place within the European Union. The Commission may also issue opinions when it believes that an investment will impact the security or policy order of more than one member state. This Regulation entered into effect in April, 2019.

The Regulation does *not* set forth that each EU member state must introduce a screening mechanism for foreign direct investment into its national law – currently one-half of the EU member states have such mechanisms in place. Instead, the purpose of the Regulation is to increase cooperation among the EU member states in terms of foreign direct investment.

What Effect Does this Have on Foreign Direct Investment in Germany and the European Union?

One thing is clear: any investment from China into Germany will be placed under a microscope. Whether this is bias or just a result of China's aggressive investment policy over the past decade is subject to debate. Regardless, it is clear that all non-EU investors need to add a potential notification to the FMEAE **to** their checklist when planning an acquisition in Germany. Also, the new EU Regulation will undoubtedly heighten debate on foreign direct investment within the European Union and may culminate in the European Commission becoming more engaged in foreign investment policies within the European Union. Finally, foreign direct investment will continue to be a topic of discussion for the EU-China Comprehensive Agreement on Investment, which China and the European Union have been negotiating for over 5 years.

COUNTRY UPDATE ON GREECE AND CYPRUS

by Dr. Harry Stamelos, Instructor/ Scientific Collaborator, European University Cyprus Law School and Attorney at Law (Greek Supreme Court) at Harry Stamelos Law Office.

The following are the significant M&A transactions in Cyprus during March 2019 for which notification has been provided to, and approval has been issued by, the Commission for the Protection of Competition (the "Competition Commission"), (in this regard, we note that Directive 2019/1 of the EU for the public enforcement of EU competition law has not been implemented under Greek law yet). For further information please see the official website of the Competition Commission www.competition.gov.cy

March 12, 2019

The Service of the Competition Commission received a notification of a concentration, according to Section 10(4) of the Control of Concentrations between Enterprises Law of 2014 (the "Concentrations Law"), concerning the acquisition of the share capital of Natural Log Ltd by Google LLC.

Google LLC is duly registered under the laws of Delaware, USA, and its main activities are related to the technology sector, specializing in services and products which are based on internet, including technologies of advertisement, research, cloud computing, software and hardware.

Natural Log Ltd is a company duly registered under the laws of Israel and is active in the development of real-time data platform for the creation of data lines and applications, utilizing data from web and mobile applications, back-end servers, connected and internet of things.

March 19, 2019

The Service of the Competition Commission received a notification of a concentration, according to Section 10(4) of the Concentrations Law, concerning the acquisition of the share capital of KACO New Energy GmbH by Siemens Aktiengesellschaft.

Siemens Aktiengesellschaft is a company duly registered under the laws of Germany and it is the parent company of the Siemens group. Its main activities are related to energy and gas, production of energy services, management of energy, manufacturing technology, motility, digital factory, processing industry and motility, financial services, health, Siemens and Gamesa Renewable Energy and Next 47.

KACO New Energy GmbH is a company duly registered under the laws of Germany and is active in the provision of solutions for the supply of solar energy and the effective management of energy, providing inverters to customers who are active in the sector of energy and solar energy industry.

KACO Photovoltaic String Inverter, subsidiary of KACO New Energy GmbH, manufactures and sells photovoltaic string inverters and offers derivative/ related services, e.g. repair and maintenance. It is noted that all of the other KACO New Energy GmbH activities which are not related to the KACO Photovoltaic String Inverter are not part of this merger.

March 20, 2019

The Service of the Competition Commission received a notification of a concentration concerning the acquisition SK Gaming Beteilingungs GmbH by Daimler AG and 1. FC Köln GmbH & Co. KGaA.

Daimler AG is a company duly registered under the laws of Germany and is active in the production of motor vehicles and in the provision of financial services.

FC Köln GmbH & Co. KG KGaA is a company duly registered under the laws of Germany. It is owned by the 1. Fußball-Club Köln 01/07 e.V, a professional football club in Cologne. Its turnover is derived from license fees, shipping fees, marketing, sponsorship, sale of merchandise, tickets etc.

SK Gaming Beteilingungs Gmb is a holding company and it's the general partner of SK Gaming GmbH & Co. KG which is a company duly registered under the laws of Germany and active in the electronic sports. This company has professional teams for various electronic games that participate in tournaments and championships.

COUNTRY UPDATE ON HONG KONG

Hong Kong's Legal System – Independent, Modern and Efficient - Well Suited to be the Governing Law for M&A Transactions

by Larry Kwok, Partner at Kwok Yih & Chan, Hong Kong, SAR, China, and Hermann Knott, Partner at Andersen Tax & Legal, Cologne, Germany.

As a special administrative region of China, the Hong Kong legal system is totally different from, and independent of, that of the People's Republic of China. Below are some potential benefits of choosing Hong Kong law for M&A practitioners.

Deep-rooted tradition of British Rule of Law

Hong Kong was under the British rule for 150 years until 1997. Because of this, Hong Kong inherited English law as the foundation of its legal system and English is the official language used in courts and in arbitration. Hong Kong is part of the English common law jurisdiction system along with the UK and the existing British Commonwealth member countries, such as Australia, Canada, India, Kenya, Malaysia, New Zealand, Singapore, South Africa, Tanzania and many other countries.

Active participation of major foreign law firms in Hong Kong legal system

The independence and openness of the Hong Kong legal system have also been clearly demonstrated by the fact that numerous UK and US law firms have set up offices in Hong Kong, including the UK Magic Circle and Silver Circle firms and prominent US law firms.

There are over 160 foreign law firms operating in Hong Kong which accounts for about 15% of the total number of law firms in Hong Kong. About half of these foreign firms can practice Hong Kong law, including representing clients in Hong Kong courts in local litigation matters.

In recent years, the "big four" accounting firms have also set up their own law firms in Hong Kong.

Foreign firms are permitted to practice Hong Kong law and to appear in Hong Kong courts

Unlike many Asian jurisdictions in which foreign law firms are permitted to practice foreign law locally but not local law, Hong Kong is more neutral and independent in this respect.

For instance, in Singapore, unless a special license is granted by the government, foreign law firms are not permitted to practice Singapore law, even if they have lawyers licensed to practice in Singapore among their ranks. At present, only nine foreign firms have been issued a restricted license allowing them to practice Singapore law, but only in the areas of banking and finance and corporate law. The license runs for a term of five years only. Granting and renewal of such license is subject to the discretion of the government. Foreign law firms in Singapore are not permitted to provide local legal and litigation advice or services except for arbitration and SICC proceedings. Such firms need to engage Singapore local firms for litigation services. A few years ago, the Singapore law minister openly criticized a major UK law firm in the Singapore Parliament because such firm had issued misleading statements in its press releases indicating that it could provide local litigation services.

In Hong Kong, a foreign law firm with the requisite ratio of Hong Kong qualified lawyers in its staff can hold itself out as practicing Hong Kong law and no special license from the government is needed. The ratio is 1:1 on the total number of lawyers of a firm, i.e., one Hong Kong qualified lawyer to one foreign lawyer. Such ease of foreign firms to practice Hong Kong laws and appearing in Hong Kong courts further evidences the independence and openness of the Hong Kong legal system.

International make-up of Hong Kong's International Arbitration Centre

Hong Kong has its own arbitration body, namely, the Hong Kong International Arbitration Centre (the "HKIAC"). The HKIAC is totally independent from the Chinese government, which is similar to the UK arbitration system. There is no restriction on foreign law firms engaging in and advising on arbitration in Hong Kong. Parties in arbitration proceedings may retain advisers without restrictions as to their nationalities and professional qualifications.

As can be seen from the make-up of the membership, the council and the International Advisory Board of the HKIAC comprises many expatriates who are prominent legal experts and judicial figures. The council, which is HKIAC's ultimate decision-making body, includes 30 council members, of which 20 members are expatriates (i.e., three from the US, one from Australia, one from Austria, 10 from UK, one from France, one from India, one from Korea, one from Singapore, one from Sweden). The International Advisory Board has 23 members, of which 18 members are expatriates (i.e., eight from UK, one from Germany, one from the US, two from France, one from Belgium, one from Singapore, one from Switzerland, one from Australia, one from Holland, one from Sweden). The overwhelming representation of the international legal community in the HKIAC council and International Advisory Board clearly substantiates the independence, neutral character and internationalism of the Hong Kong arbitration system.

International composition of Hong Kong Court of Final Appeal

In addition, Hong Kong courts are not only presided by local judges but also foreign expatriate judges. For instance, the judges at the highest court in Hong Kong (i.e., the Court of Final Appeal), are predominantly expatriate judges. The Court of Final Appeal was established to replace the English Privy Council after the handover of Hong Kong from UK to Mainland China in 1997.

As can be seen from the composition of the Court of Final Appeal, many of the judges are expatriates from English law-based countries such as the UK, Australia and New Zealand. There are 20 judges of the court of Final Appeal of which four are permanent judges and 16 are non-permanent judges. Permanent judges are all Hong Kong locals. Non-permanent judges comprise 9 judges from UK, four from Australia and only three are Hong Kong locals. The appointment of foreign judges to Hong Kong's Court of Final Appeal from UK and Australia (both are English common law countries) further testifies to the independence and neutrality of the Hong Kong judicial system.

Good reasons to choose Hong Kong law to govern M&A transactions

As outlined above, Hong Kong remains a reliable common law jurisdiction. In 2018 71% of all foreign investments into China were channeled through Hong Kong. This factor plus Hong Kong's sophisticated corporate and contract law as well as the sophisticated Takeover Code (applicable to the takeover of listed companies) are important considerations for planning and implementing international M&A transactions. What makes Hong Kong additionally attractive for M&A purposes is a tax regime which is favorable from an investor's perspective (i.e., no capital gains tax and no withholding tax on dividends). A further benefit for foreign investors is that in Hong Kong there are no foreign exchange controls.

COUNTRY UPDATE ON INDIA

by Sharanya G. Ranga, Partner, and Deepali Menghwani, Associate, at Advaya Legal.

Despite the ongoing global trade wars and "Brexit" uncertainty rocking most part of 2018, India continues its growth to remain one of the world's fastest growing economies, with projected growth rate on average of about 7% in the next couple of years.[5] Inbound M&A into India registered a 77% increase in deal value from USD 31.5 billion in 2017 to USD 55.8 billion in 2018 and total cross-border M&A activity more than doubled to USD 69.2 billion last year.[6]

This growth of economic activity has been in part due to a host of reforms undertaken by the Government of India to make India an attractive investment destination. This has also helped India jump 23 positions in the World Bank's '*Ease of Doing Business*' Index rankings from 100 in 2017 to 77 in 2018.

With a view to liberalize the corporate regulatory framework and enhance the "ease of doing business in India", the past year has seen amendments in Indian company law, including: (i) the substitution of fines for criminal consequences in case of technical/procedural lapses and (ii) an in-house adjudication mechanism to reduce backlogs at the company law tribunal. Another recently introduced amendment mandates that individuals holding ultimate beneficial interest in shares of Indian companies disclose their ownership to the Ministry of Corporate Affairs.

The Supreme Court of India recently upheld the constitutional validity of the nascent Insolvency and Bankruptcy Code (IBC). The IBC has been instrumental in the resolution of stressed assets and providing a fillip to M&A activity.

The Specific Relief Act has been amended to facilitate the enforcement of contracts. Specific performance of a contract is now the general rule, with damages being the exception. A provision on 'substituted performance' has been introduced that enables the suffering party to get the unperformed contract performed by a third party and recover the losses from the breaching party.

The implementation of a single 'Goods and Service Tax' (GST) regime for the country has tremendously eased the flow of goods and services across state boundaries and has brought in more businesses to the formal economy.

The policy framework on foreign direct investment (FDI) continues unchanged, with most sectors not requiring any prior permission for foreign investment. The regulations on cross-border mergers set out a progressive framework for cross border mergers in India by doing away with the prior approval of the Reserve Bank of India (RBI), India's central bank. This demonstrates the RBI's clear intent to encourage cross border deals involving Indian parties.

A snapshot of some notable M&A deals in India in 2018-19 is outlined below:

- US-based Walmart Inc. acquired India's largest e-commerce firm, Flipkart (Amazon's primary competitor in India) for $16 billion in May 2018 in what is touted as the biggest e-commerce deal globally.

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[5] https://economictimes.indiatimes.com/news/economy/indicators/indias-gdp-expected-to-grow-at-7-3-in-2018-19/articleshow/67451511.cms

[6] https://www.livemint.com/Companies/VD0HHHQHCUwiCjsxeTGCLN/Indian-companies-log-record-129-bn-in-MA-deals-in-2018.html

- The merger of telecom players Vodafone India and Idea Cellular created India's biggest telecom operator with more than 400 million customers and market share of 37% in revenue. The merger will also help fend off competition from market leaders Airtel and Reliance Jio.
- In key insolvency buyouts, Tata Steel acquired a 73% stake in Bhushan Steel for $ 4.9 billion. Another long-drawn tug of war for the acquisition of Binani Cement was concluded with India's largest cement maker UltraTech Cement acquiring the entity for around $ 1.15 billion.
- Hindustan Unilever Ltd, the Indian subsidiary of Unilever, acquired GlaxoSmithKline Consumer Healthcare, an iconic health drink brand, for an all-stock merger deal of $ 4.5 billion, which gave the local unit of Unilever brands such as Horlicks, Boost and Viva.
- In one of the largest deals in the agrochemicals space, UPL Ltd., a leading Indian agrochemical company, through its international arm UPL Corporation Ltd., acquired Arysta LifeScience Inc. from US based Platform Specialty Products for $ 4.2 billion. The combined entity is expected to be the fifth-largest agrochemicals company in the world.
- Ostro Energy Private Limited, set up by UK based PE firm Actis in 2014 was acquired by one of India's largest clean energy companies, ReNew Power at an enterprise value of $ 1.6 billion.
- The last few months have also seen India's first "hostile takeover" in the information technology sector play out in the media culminating with Larsen & Toubro (L&T) , which already has a listed IT company L&T Infotech Ltd., acquiring 20.32% stake in IT service entity Mindtree. L&T is also taking steps to acquire 15% from the open market and another 31% through an open offer.

Given the upcoming Indian general elections, there may be an immediate slowdown in M&A deals till June 2019. This is expected to be a temporary lull and foreign investor interest in India remains bullish.

COUNTRY UPDATE ON POLAND

M&A Market Recent Development in Poland and Legislation Updates

by Paweł Sikora, Partner (Warsaw) and Grzegorz Pobożniak, Partner (Krakow), at Kubas, Kos, Gałkowski.

The current substantial diversification in M&A deals, in particular in the market of Central and Eastern Europe, is noticeable. The value and activity of transactions has increased significantly in Poland. In 2018, the Polish market recorded a 12% growth in the number of acquisitions (323) announced. However, in comparison to previous years (2016-2017), when big transactions had increased the value of the Polish market to about EUR 10 billion, last year saw a nearly 40% drop M&A deal value. Nonetheless, the availability of attractive assets, current valuations, and measurable economic growth encourage interest in Polish M&A. Moreover, the outlook for the Polish M&A and JV market in the near future is optimistic. There are significant developments in Polish legislation already affecting, or which will affect, the M&A market. Below is a brief description of some of the changes introduced to Polish law worth mentioning.

First, with the recent amendment of the Bonds Act (effective on July 1, 2019), the procedure to issue corporate bonds (often used in acquisition finance) will become more complicated. From July 1, 2019, all issued bonds (even those not listed on a public exchange) will be required to be dematerialized and registered with the National Securities Deposit. Also, for private bond placements, every issuer is obligated to retain a placement agent (financial institution holding securities accounts or fiduciary banks) who will be responsible for ensuring that the issuer complies with all issue terms of bonds and that the bonds are registered in a security deposit. There are no exceptions to this requirement, which may constitute an unjustified burden for some would-be issuers/acquirors.

Second, under recent amendments to the Polish Code of Commercial Companies (effective March 2019), members of limited liability companies will be able to deliberate on (i) approving annual financial reports, (ii) distributing profits (or covering losses) and (iii) approving member actions in writing, without the necessity of holding a members' meeting (which must always take place in Poland). This amendment will allow foreign shareholders to deliberate on these matters without having to be present for a members' meeting in Poland in person or via proxy.

Third, on January 8, 2019, the Polish Government adopted the draft Act on the liability of "collective entities".[7] We expect that the draft Act will soon enter into force. The main goal of this regulation is to increase the effectiveness of the mechanism of preventing and prosecuting economic and tax crimes, including corruption amongst legal entities, and to protect whistleblowers reporting on such irregularities. Liability of an entity depends in large part on managers exercising due care, however the new regulation imposes a number of additional risks related to the operation of the company's business, which in turn will likely increase administrative burden. This should be taken into account when preparing a due diligence report. The proposed changes stipulate that the liability of collective entities depends primarily on: 1) whether a prohibited act is committee; 2) any responsibility for failing to properly supervise or select the employee; and 3) failure to take appropriate measures to manage or mitigate the risks of a prohibited act. Penalties provided in the Act include fines of PLN 30,000 to PLN 30,000,000 (and in certain circumstances up to PLN 60,000,000), and even the dissolution of a collective entity.

[7] Under the act on the liability of "collective entities", a "collective entity" means any legal entity or any organizational unit having legal capacity under Polish law, including all kinds of corporations and companies.

Fourth, as of January 1, 2017, in-kind contributions are subject to a new tax under Polish law. Under new regulation, the tax basis to determine a company's income tax from contributions in kind to the company (other than the business or the organizational portion) is equal to the value specified in company's articles of association or in the agreement or (in the absence thereof) in any other document of a similar nature. If this value is lower than its market value or it is not specified in such documents, the income is determined based on market value of the contribution in kind determined as of the date of transfer of title. As a result, for income tax purposes, the significance of the decision on which part of the contribution in kind should be made to company's share capital and which should be transferred to reserve capital (as the *agio*), in principle, is no longer of importance.

Last, but not least, the new Polish regulation on Employee Capital Plans might require consideration in some M&A and JV transactions. Employee Capital Plans constitute the long-term saving system introduced by the Polish government as a compulsory measure for the inefficiency of the Polish pension system. Employee Capital Plans inevitably result in the further increase of employment costs. Considering that implementation of the Employee Capital Plans is mandatory for the largest employers (employing at least 250 employees) and entails additional costs for them (the new regulation becomes effective on July 1, 2019 and employers may have not accounted for this in their budgets), it is crucial to become familiar with these new requirements, especially in due diligence of a target in an acquisition, as there are alternatives to comply with this requirement, such as such as establishing an Employee Pension Program.

COUNTRY UPDATE ON SPAIN

W&I insurance in Spanish M&A

by Albert Garrofé, Partner, Idoya Fernández, Counsel, and Lola Tejero, Principal Associate, at Cuatrecasas.

Since 2016, the Spanish M&A market began to follow the emerging trend in worldwide M&A of parties using warranty and indemnity insurance in M&A transactions ("W&I insurance", also known in the U.S. as representation and warranty insurance).

This trend is especially notable in M&A transactions involving private equity funds, as it allows the fund to make a clean exit when exiting a portfolio investment. In the event of a breach by a Seller of its representations and warranties, the buyer's sole and exclusive remedy would under the W&I insurance policy - the buyer would have no claim against the seller (other than for fraud, willful misconduct or breach of fundamental warranties).

W&I Insurance policies are usually buyer friendly and, in most cases, negotiated within the context of an auction process or exit transaction. Seller-side policies tend not to the best option as they typically contain a general exclusion for actual knowledge. For this reason, sometimes W&I Insurance is obtained by following a so-called "seller to buyer flip," i.e., the seller starts the process of negotiating the policy, but the buyer finalizes it. This is most common in deals structured as an auction.

W&I insurance coverage depends on the policy finally negotiated, but usually excludes:

(i) matters of which the insured party has actual knowledge of (i.e., matters discovered during the due diligence process ("DD"));
(ii) matters outside the DD scope;
(iii) anti-bribery, anti-corruption, anti-money laundering and tax evasion warranties;
(iv) fines and penalties (at least, criminal penalties);
(v) purchase price adjustment and locked-box mechanisms;
(vi) forward-looking warranties;
(vii) environmental liability;
(viii) transfer pricing, and joint and several tax liability for belonging to a corporate group;
(ix) the condition of assets;
(x) product liability; and
(xi) seller's covenant or commitment related to managing the business during the interim period.

The process to put a W&I Insurance policy in place will depend on each transaction, but often lasts between 10 days and three weeks. The W&I policy is usually negotiated between signing and closing, and enters into force at closing. The average premium is usually between 1% and 2% of the sum insured.

COUNTRY UPDATE ON U.S.

New Law Expands Scope of Jurisdiction and Powers of CFIUS

by Geoffrey M. Goodale, Partner at FisherBroyles. LLP, USA.

In August 2018, President Trump signed into law the Foreign Risk Review Modernization Act of 2018 (FIRRMA). As discussed below, FIRRMA significantly expands the scope of jurisdiction and powers of the Committee on Foreign Investment in the United States (CFIUS).

Background on CFIUS

CFIUS is an inter-agency committee for which the Secretary of the Treasury serves as Chair that is authorized to review any transaction that could result in a foreign person obtaining the ability to control a U.S. business that could pose a threat to U.S. national security.[8] If, based on its review of a transaction, CFIUS concludes that a transaction threatens to impair U.S. national security, it can recommend that the President suspend or prohibit the transaction.[9]

While such power rarely has been invoked, President Trump has shown his willingness to exercise such authority. For example, on March 12, 2018, President Trump signed an executive order to prohibit the proposed acquisition of U.S.-based Qualcomm by Singapore-based Broadcom in accordance with CFIUS' recommendations and concerns about Broadcom's relationships with third party foreign entities and the national security effects of Broadcom's business intentions with respect to Qualcomm.[10]

Enactment of FIRRMA

As powerful as CFIUS was demonstrated to be by this action taken by President Trump, the U.S. Congress sought to strengthen CFIUS by passing FIRRMA, which President Trump signed into law on August 13, 2018.[11] Specifically, as discussed below, FIRRMA is intended to expand the scope of jurisdiction and powers of CFIUS.
In terms of scope, FIRRMA amends the Defense Production Act of 1950 by broadening the scope of "covered transactions" that are subject to CFIUS review.[12] Specifically, FIRRMA creates the following four new types of covered transactions:

(1) any other investment by a foreign person in any US business involved in critical infrastructure, the production of critical technologies, or that maintains sensitive personal data that, if exploited, could threaten national security;
(2) any change in a foreign investor's rights regarding a US business where that change would result in foreign "control" of a US business or where the change involves critical infrastructure or critical technology companies;
(3) any other transaction, transfer, agreement, or arrangement designed to circumvent or evade CFIUS; or
(4) the purchase, lease, or concession by or to a foreign person of certain real estate in close proximity to military or other sensitive national security facilities.[13]

Once the necessary implementing regulations are issued by the U.S. Department of the Treasury (Treasury

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[8] 50 U.S.C. § 4565 (2015); Exec. Order No. 11858, 40 Fed. Reg. 20,263 (May 9, 1975).
[9] 50 U.S.C. § 4565(d)(2).
[10] Order of March 12, 2018, 83 Fed. Reg. 11,631 (March 15, 2018).
[11] Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, Title XVII, Subtitle A (2018).
[12] FIRRMA at § 1703.
[13] *Id.*

Department), CFIUS will have the authority to review, mitigate, or recommend the blocking or divesture of these new kinds of covered transactions.

With respect to the power of CFIUS, FIRRMA clarifies that CFIUS may initiate its own reviews of transactions and possesses the ability to stop a transaction from closing when CFIUS perceives a threat to national security that may require mitigation or result in a recommendation that the transaction be blocked.[14] FIRRMA also grants CFIUS the authority to use mitigation agreements and conditions to address situations where the parties have chosen to abandon a transaction without a presidential order as well as to impose interim mitigation agreements and conditions for national security risks posed by completed transactions while such transactions are undergoing CFIUS review.[15]

On October 11, 2018, the Treasury Department promulgated two sets of FIRRMA implementing regulations. The first set of regulations was largely administrative in nature and served to amend the existing CFIUS regulations to implement certain FIRRMA provisions that took effect immediately upon being signed into law.[16] The other set of regulations enumerated procedures and requirements relating to a pilot program expanding CFIUS jurisdiction over certain non-controlling foreign investments in critical technology companies and requiring that mandatory declarations be filed with CFIUS relating to foreign investments in such companies that entered into effect on November 10, 2018.[17]

FIRRMA-Related Program at the Section's 2019 Annual Conference

Those who will be attending the ABA Section of International Law's 2019 Annual Conference and wishing to learn more about FIRRMA and the increasing importance of CFIUS are encouraged to attend the program on *The Need for Enhanced Due Diligence in Cross- Border M&A Transactions in Light of New Laws* that is being co-sponsored by our Committee and the Section's National Security Committee, International Trade Committee, and Export Controls and Economic Sanctions Committee. This program, which will be held on April 10 from 4:30 p.m. to 6:00 p.m. at the Capital Hilton in Washington, DC, will feature a panel of U.S. and non-U.S. practitioners (including the U.S. Department of Defense's Associate Director for CFIUS Operations) that will discuss how FIRRMA has changed things for CFIUS and that will use a hypothetical fact pattern to highlight the wide range of critical issues that must be considered when doing international M&A transactions in the United States, especially ones involving emerging technologies.

[14] *Id.* at § 1708.
[15] *Id.* at § 1718.
[16] 83 Fed. Reg. 51,316 (Oct. 11, 2018).
[17] 83 Fed. Reg. 51,322 (Oct. 11, 2018).

REPORT ON ABA SIL MEXICO CITY AND ABA SIL SEOUL

ABA SIL - MEXICO CITY PANEL

The panel included Alex Hao from JunHe LLP, Peter Quinter from GrayRobinson P.A., Paul Edelberg from Fox Rothschild LLP, and Manny Supervielle from Veritas Assurance Partners, LLC.

The panel discussed the reconfiguration of foreign investment as a result of U.S. foreign investment policies. Since the advent of the Trump administration, the U.S. government has enacted much more stringent international investment policies, which has resulted in a "siege" on international trade and trade agreements. In light of the changing investment environment in the U.S., Chinese and U.S. multinational companies have begun to shift their investment focus elsewhere, such as in Latin America.

The panel also offered practical advice to in-house and outside counsel on how to guard against increasing compliance risk. As Chinese companies accelerated investments in Latin American countries in recent years, Chinese interests have begun to exert increasing influence on this region's economic and political development. Because Chinese investors have been offering Latin American businesses and governments greater investment promise, Latin American businesses and governments have been more open and, to a degree, less stringent in terms of clients standards on Foreign Corrupt Practices Act (FCPA) and similar EU anticorruption laws or regulations. This phenomenon in Latin American can result in increased compliance risk for U.S. multinational companies which interact with the local businesses and governments ever more frequently.

ABA SIL – SEOUL PANEL

The panel included Mr. Takashi Toichi from TMI Associates, Tokyo Japan as a Moderator, and the following speakers:

- Fang He, JunHe, Beijing, China
- Upasana Rao, Trilegal, Delhi, India
- Jang Hyuk YEO, Lee & Ko, Seoul, South Korea
- LAM Chung Nian, Wong partnership, Singapore

The panel discussed the recent trends and developments in technology M&A in Asia.

The session was initiated by moderator Takashi, who explained the key M&A trends in Asia, among them that over USD 86 billion of telecom, media and technology (TMT) related M&A deals were announced in Asia in 2017, and growth in M&A announcements in the Asia Pacific region over the ensuing six months is predicted to be led by the TMT sector, in addition to the industrials and energy & power sectors. Takashi added that key areas in the region are fintech and transport & electronic mobility (including autonomous drive technologies), and artificial intelligence (AI).

Fang from China described that M&A of hi-tech and TMT industries in China in 2018 was in rapid development, after a slight decrease in 2017, and AI, fintech and autonomous drive technologies were the hot industries. She added that Baidu's acquisition of Raven Tech, an AI voice interaction company, and Alibaba's acquisition of Beijing Sound Connect Technology were the spotlight domestic transactions. She further explained Chinese law requirements for import and transfer of technologies in China, challenges for technology investments by U.S. Companies, such as U.S. tariffs that take aim at made in China 2025, and technology export control.

Upsana from India described that M&A Deals in the tech sector in India significantly increased in 2017 from 2016 in deal value, although it was flat in terms of number of transactions. She added that key sectors driven by technology were fintech, healthcare, retail & e-commerce and automotive & transport. After she explained legal & policy framework enabling technology deals, she further explained that exchange control laws, data protection framework, tendency to over-regulate, tax consideration and lack of infrastructure, as issues and challenges that people see in Indian technology M&A deals.

Jang from Korea described that R&Ds were dominated by large conglomerates, and investment in start-ups in Korea is steadily increasing. Also, he described steady growth of technology M&A in computer software, internet/e-commerce in recent years, and emergence of start-up alliances, are the trend in Korean technology M&A market. He added that although there were relatively few roadblocks to pursue M&A opportunities in Korea, there were severe legal challenges for technology business and startups to grow in Korea, including license and approval requirements and qualifications to meet to operate the business.

Lastly, Chung Nian from Singapore described issues in Singapore, including that start-ups do not invest enough in seeking legal advice, and investors often still demand full diligence on targets. He also discussed MAS Regulatory Sandbox for Fintechs, and common funding structures for tech start-ups. He further described fund-linked tokens, revenue/profit sharing tokens and utility tokens upon ICOs, and key terms thereof, such as exit clauses, liquidation preferences, representations and warranties, founder indemnities and guarantees, and founder conflicts of interest.

With several questions being asked, the panel was concluded.