

# Corporate and M&A Law Committee: Current legal developments in M&A



**IBA2016** 18–23 SEPTEMBER  
WASHINGTON DC

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

OFFICIAL CORPORATE SUPPORTERS



# Current legal developments - M&A

## Session moderators

- Ignacio Pesquiera (*Galicia Abogados, Mexico*)
- Nicola Charlston (*King & Wood Mallesons, Australia*)

## Panellists

- Rabindra Jhunjhunwala (*Khaitan & Co, India*)
- Scott Guan (*Zhong Lun Law Firm, China*)
- Ellisa Habbart (*The Delaware Counsel Group LLP, USA*)
- Tomas Allende (*Estudio Beccar Varela, Argentina*)
- Jose-Maria Perez (*Bredin Prat, France*)

GALICIA  
ABOGADOS

KING & WOOD  
MALLESONS  
金杜律师事务所

 KHAITAN  
& CO  
Advocates since 1911

 中倫律師事務所  
ZHONG LUN LAW FIRM

THE  
DELAWARE  
Counsel GROUP LLP  
Attorneys at Law

ESTUDIO BECCAR VARELA  
DESDE 1897

BREDIN PRAT  
AVOCATS



KHAITAN  
& CO  
*Advocates since 1911*

India:  
Rabindra Jhunjhunwala  
*Khaitan & Co*

# Opening of markets and policy reforms

## 1. Increased M&A activity post the general elections in 2014

- Various investor friendly policy reforms introduced by the Modi Government
- M&A activity increased in 2014 with deals worth US\$38.1bn being concluded, compared to US\$28.2bn in 2013 and US\$35.4bn in 2012
- India's M&A activity witnessed the highest ever annual volume in the year 2015 accounting for 9.7% of total Asia-Pacific market
- The first half of 2016 witnessed M&A activity worth US\$15.7bn

## 2. Reforms to the Foreign Investment Policy

- Increased investment limits in various sectors - defence and insurance top sectors
- Relaxations re swap of shares, issue of partly paid shares and warrants

# Opening of markets and policy reforms

## 3. Evolving Laws

- Increased financial thresholds for determining the Competition Commission's jurisdiction
- Amended arbitration laws with a view to making arbitration in India quicker and reduce interference by courts
- Indian Parliament has passed the GST Bill with a view to reform India's indirect tax structure and integrate the country into a single market
- Proposed amendments to Companies Act to ease day to day business

## 4. Other initiatives

- Series of measures to improve Ease of Doing Business including single-window clearance
- Emphasis on simplification and rationalisation of the existing rules and introduction of information technology to make governance more efficient and effective
- Initiatives, such as "Make in India", "Smart Cities", "Start up India" and "Digital India"

# Attractive Investment Destination

## Attractive sectors

- Information Technology
- Financial services
- Pharmaceuticals
- Manufacturing
- Retail and e-commerce
- Construction and Infrastructure

## India: a resilient market

- Outperformed peers to emerge as the preferred investment destination for strategic and institutional investors
- Managed to remain insulated from the Chinese slowdown and monetary policy of the West
- Thriving start-up ecosystem

China:

Scott Guan

*Zhong Lun Law Firm*

# Merger Control Filing and the New Fast Track Process

## 1. Standard process

- MOFCOM & threshold
- Pre-docketing (3-12 weeks) + Phase I (30 days) + Phase II (90 days) + Extended Phase II (60 days)

## 2. Fast track process

- Eligible categories
- Key points and practical issues
  - voluntary application
  - optional consultation
  - simplified information request
  - public announcement
  - how fast?

# In-bound Acquisition: Pricing and Payment Issue

1. General rules on pricing: appraisal value based
2. Special consideration for state-owned companies
  - Transaction through a qualified market
  - Public announcement and uncertainties
  - Minimum price: 90% of net asset value
2. Time limit on consideration payment
  - 3 months after issuance of new business license
  - 60% within 6 months and rest within 12 months
  - Profit distribution based on actual payment
  - Earn-out?

United States of America:  
Ellisa Habbart

*The Delaware Counsel Group LLP*

# Fiduciary Duties: A Shift in the Standards of Review?

1. Three well-established standards of review are applied by Delaware courts to determine whether a board has complied with its fiduciary duties in the M&A context:
  - The business judgment rule (deferential standard)
  - Enhanced scrutiny (intermediate standard); and
  - Entire fairness (least deferential standard)
2. Several recent cases reflect a shift in the application of the enhanced scrutiny standard of review in post-closing actions:
  - *Corwin et. al. v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. Oct. 2, 2015)
  - *City of Miami General Employees' and Sanitation Employees' Retirement Trust v. Comstock*, C.A. No. 9980-CB (Del. Ch. Aug. 24, 2016)
  - *Larkin v. Shah*, C.A. No. 10918-VCS (Del. Ch. Aug. 25, 2016)

# Fiduciary Duties: A Shift in the Standards of Review?

## 3. What is a Controlling Shareholder?

- Under Delaware law, a controlling shareholder exists when a stockholder:
  - owns more than 50% of the voting power of a corporation; or
  - exercises control over the business and affairs of the corporation
- A number of shareholders can collectively form a control group where working together

## 4. What standard applies to transactions involving a conflicted controlling shareholder?

- Entire Fairness will apply unless the transaction is conditioned *ab initio* upon both:
  - the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and
  - the uncoerced, informed vote of a majority of the minority stockholders.
- If both protections are utilized, the business judgment standard will apply
- *C & J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*, 107 A.3d 1049 (Del. Dec. 19, 2014)

# Appraisal Claims / Appraisal Arbitrage

## 1. Significant increase of appraisal claims over the past decade

- The court judges the outcome the directors achieved and will generally give substantial weight to the merger price as an indicator of fair value
  - But see *In re Appraisal of Dell Inc.*, 2016 WL 3186538 (Del. Ch. May 31, 2016)

## 2. Appraisal Arbitrageurs

- Strike suits allow so called “Appraisal Arbitrageurs” to benefit financially in a company in which they had no “ongoing concern”
- Purchase shares of the company being merged or acquired after the record date of the transaction at issue
- Target transactions that have potential conflicts of interest
  - Ex. Going-private deals, minority squeezeouts, and short-form mergers

## 3. Two principal 2016 amendments to the Delaware Appraisal Statute:

- The *De Minimis* Exception; and
- Tender of Early Payment

# The Blockchain Initiative and Equity Crowdfunding

## 1. The Delaware Blockchain Initiative

- A process which would allow Delaware corporations to issue corporate shares on a blockchain using Bitcoin technology rather than through the DTC system
- A single digital ledger of transactions shared among a network of computers
- Participants share a single database, allowing trades to be executed instantaneously without reliance on intermediaries and with guaranteed settlement

## 2. Delaware Equity Crowdfunding

- On July 11, 2016, Governor Jack Markell signed a bill into law to allow Delaware businesses to sell stock using a method similar to “crowdfunding”
- Local investors will now be permitted to buy a small stake in local start-up companies, whereas previously only “qualified investors” could buy equity in start-up companies
- 1 million dollar fundraising cap set by new federal rules

Argentina:  
Tomas Allende

*Estudio Beccar Varela*

# Winds of change in Argentina

*“Start by doing what's necessary; then do what's possible; and suddenly you are doing the impossible.”* Francis of Assisi

## Agenda

1. POLITICAL SWITCH – PRESIDENTIAL ELECTION OF 2015
2. KEY RELEVANT CHANGES TO BOOST FOREIGN INVESTMENTS
3. FOREIGN INVESTMENT IN ARGENTINA
4. FOREIGN EXCHANGE REGULATIONS
5. RENEWABLE ENERGY REGULATORY FRAMEWORK OVERHAUL



# Political Switch

*“Get your facts first, then you can distort them as you please.”* Mark Twain

Argentina has been plagued by political and economic mismanagement

- Under the previous administration, the country’s governance and economic growth has been constrained by a populist government that faced limited competition from a weak and divided opposition
- Advancement of executive power over legislative and judicial powers weakened key republican institutions, including Argentina’s Central Bank and regulatory agencies. Governance deteriorated in line with increasingly interventionist policies adopted by the prior administration
- Political and economic mismanagement have diluted the value of Argentine assets across the board
- Many sectors have suffered over a decade of limited investments, especially when compared to other Latin American countries



# Political Switch

## A Special Window of Opportunity

- Following November 2015 presidential election of Mauricio Macri, a rapidly improving political and economic conditions are key to catalyze a wave of private investment
- Current administration's focus on strengthening republican institutions, normalizing economic variables and returning to the international markets should lead to sustainable growth in the next few years
- Financial market's positive reaction to Macri's election has already resulted in a reduction in the country's risk premium. Sovereign yields have tightened by over 250 bps\* since the summer highs
- Private investment is going to play a key role in achieving government goals
- Current challenges: inflation and employment



# Key Relevant Changes to Boost Foreign Investments

Market friendly policies were put in place right after the new administration took power:

1. Foreign exchange controls were disabled to normalize activity.
2. Export taxes were reduced or eliminated for most activities.
3. Subsidies which heavily impacted fiscal accounts were reduced.
4. Sovereign default and conflict with holdouts have recently been resolved: this successful arrangement led Argentina to a record bond issuance in the international capital markets.

## Argentina, Holdout Creditors Agree to \$4.65 Billion Settlement

Argentina and its “holdout” hedge-fund creditors reached an agreement that could free the nation to return to the global financial markets for the first time in 15 years.  
41 minutes ago

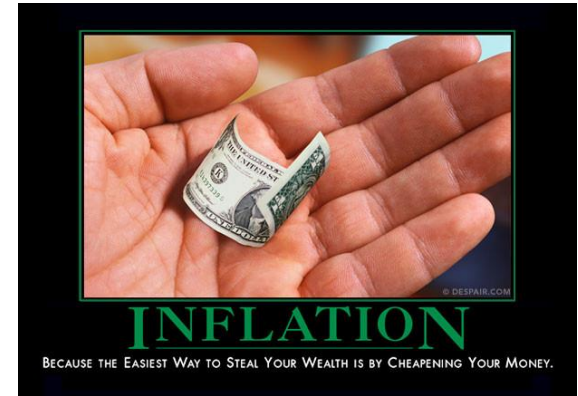


- Argentina paid its “holdout” creditors \$9.3bn on April 2016, putting an end to the country’s 2001 default.
- The payment enabled the country to put behind the lack of access to international capital markets for 14 years.
- To fulfill this payment Argentina issued 16 bn in bonds, the largest issuance ever.
- This inflow of funds in addition to pay hold-outs, allowed Argentina to improve its reserves.
- Strong Debt issuance pipeline
- Grupo Supervielle, had its IPO last week, the first one in a long time.

# Key Relevant Changes to Boost Foreign Investments

## Next steps towards economic normalization

1. Secure legislative support on certain reforms to be discussed in congress that are considered as key elements to grant governability.
2. Reduce increasing inflation as a consequence of the gradual reduction of the fiscal deficit and a slower pace of growth of the monetary aggregates.
3. Accelerate economic recovery to mitigate fiscal adjustment.
4. Introduce additional tax incentives and improve market credibility to boost foreign direct investment across different sectors of the economy.
5. Finalize implementation of a fiscal moratorium to capture a large portion of Argentine funds currently held offshore.



# Foreign Exchange Regulations

## Freely disposable funds

- Resident companies and individuals allowed to access the FX Market without limitations (before 2MM per calendar month )
- No previous fiscal validation by the Argentine Federal Tax Administration (“AFIP”) nor the approval of the Argentine Central Bank.
- Tax surcharges creditable against income tax – for the use of credit/debit cards abroad, travel and tourism expenses (35%) and purchase of foreign currency by individuals (20%) were abrogated.

## Offshore Financial Loans

- Resident companies and individuals allowed to access the FX Market without limitations (before 2MM per calendar month )
- No previous fiscal validation by the Argentine Federal Tax Administration (“AFIP”) nor the approval of the Argentine Central Bank.
- Tax surcharges creditable against income tax – for the use of credit/debit cards abroad, travel and tourism expenses (35%) and purchase of foreign currency by individuals (20%) were abrogated.

## Payments for import of goods and services

- Free access to FX Market



# M&A Will Benefit from New Policy

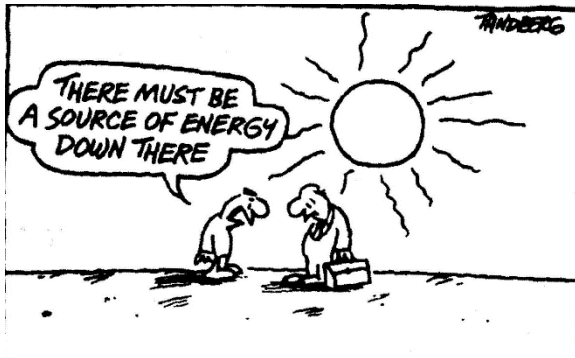
## M&A presents a compelling opportunity

- Argentine companies present attractive valuations, resulting from a significant pipeline of opportunities and a limited number of buyers/investors
- Reversal of constraints upon capital expenditure investments over the last 10 years should boost growth
- With almost no M&A activity since 2011, there is at least a 4-year backlog of demand for exits
- The country is still “off-limits” for many multinational companies, who would likely be the main candidates for exits in 3-5 years
- PE Funds new players
- Moratorium Law eliminated withholding tax (10%)
- Reorganization of Antitrust Authority
- Civil & Commercial Unification Code



# Renewable Energy: New Regulatory Framework

- Complete Overhaul of the RE Regulatory Framework .
- National RE targets power consumption generated by renewable sources (wind, solar, geothermal, biomass, bio-fuels, etc.).
- Must be by 2018 (8%) and by 2025 (20%) mandatory to all types of consumers.
- Improvements to the Regulatory Framework:



1. Competitive and transparent market rules and contract mechanisms
2. Mandatory pass-through of PPA costs to consumers
3. Sector specific trust fund to provide PPA payment guarantees and debt financing to projects
4. Significant fiscal incentives
5. Initial Bid oversubscribed x6

# Europe (France): Jose-Maria Perez

*Bredin Prat*

Recently enacted contract law reforms: their impact on M&A transaction practices

# Cross-panel discussion

## Warranty and indemnity insurance



**IBA2016**

18–23 SEPTEMBER  
WASHINGTON DC

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

OFFICIAL CORPORATE SUPPORTERS



# Cross-panel discussion

New and developing areas of M&A due diligence



**IBA2016** 18–23 SEPTEMBER  
WASHINGTON DC  
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

OFFICIAL CORPORATE SUPPORTERS



# Questions?



**IBA2016** 18–23 SEPTEMBER  
WASHINGTON DC

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

OFFICIAL CORPORATE SUPPORTERS

