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International M&A and Joint Ventures Committee Newsletter

October 7, 2011

Forward From the Committee Co-Chairs:

As Co-Chairs of the International M&A and Joint Venture Committee, and on behalf of our Committee's entire leadership team, we commend for your reading this second edition of the Committee newsletter for the 2011. We hope that you will become a regular reader and will find the content of the Committee's newsletters to be practical and useful in your practice.

To our Committee members, we also want to welcome you to what we feel will be an exciting 2011-2012 for our group, in terms of scholarship, meeting programming and networking opportunities. We encourage you to seek out ways to become active with the Committee, starting with our Committee conference calls on the first Tuesday of each month.

We are looking forward to this year's Fall Meeting in Dublin, starting on Tuesday, October 11. We are particularly excited about the numerous fine programs in store which have been prepared by Committee members, and we urge your attendance and participation at our Committee sponsored sessions. The programs are looking to be most informative, covering a wide array of current issues of note for cross-border transactional lawyers.

Finally, we want to pay special thanks to Committee members who have been hard at work on the newsletter, now under Gordon Cameron's stewardship following a great run for the last several years led by Kees Koetsier. We know Gordon will welcome your participation in upcoming publications.

Best regards, and see you in Dublin!
Mattia Colonnelli de Gasperis, Co-Chair
Randall A. Hanson, Co-Chair

Editor's Note:

It is a real pleasure to take over the role of editor of our Committee's newsletter. Because of the work of Kees and the contributions of many Committee members, we have taken a small four page newsletter that covered two countries in its first edition in 2006, to a regular newsletter that frequently covers more than ten jurisdictions per edition. Our newsletter has become a valuable tool for keeping Committee members informed of M&A developments in our respective countries.

We have a number of very interesting articles in this edition, spanning twelve countries on four continents (come on South America and Africa, we need some contributions from you next time!). Of particular note, Adrian Benson has provided an update on the M&A market and some recent legal developments in Ireland, just in time for our Dublin meeting, and Frances Murphy has provided a summary of some of the key recent changes to the UK's Takeover Code.

As always, many thanks to the Committee members that contributed to this newsletter. Our next edition is planned for late 2011 or early 2012 – please keep a look out for a call for submissions in late November or December.

Kind regards,
Gordon Cameron

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By Philippe Shin, Shin & Kim, Seoul, Korea (pjshin@shinkim.com)

Introduction of Cash-Out Mergers

Cash-out mergers, which have caused controversy over their enforceability and scope under the Korean Commercial Code ("**KCC**") currently in effect, will be fully permitted under the amended KCC, which will take effect on April 15, 2012. The amended KCC allows not only cash but also "other corporate assets" to be used as merger consideration. "Other corporate assets" include, among other things, bonds, shares and other securities.

As the amended KCC repeals the current limit on the total principal amount of bonds issuable by a Korean corporation, there is likely to be an increase in the number of cash-out mergers where consideration is paid in bonds. Triangular mergers, where consideration consists of shares of the surviving company's parent, are also expected to become more frequent.

The amended KCC prohibits the use of cash-out mergers in some other types of corporate restructuring, such as a merger of a spun-off company into another company and comprehensive share swap.
Cash-out mergers could help reduce management costs by squeezing out minority shareholders or be utilized as an alternative tool for delisting. Cash-out mergers may raise concerns about minority shareholder protection, although, at least in theory, minority shareholders can protect their interests by exercising the appraisal right granted to dissenting shareholders in a merger. It is still uncertain whether unfair cash consideration for a merger would constitute legal grounds for a minority shareholder to file a lawsuit to void the merger.

Introduction of Hapja Johap and Yuhan Chaekim Hoesa

Recent amendments to the KCC include the addition of two new types of business entities: hapja johap ("**partnership association**") and yuhan chaekim hoesa ("**LLC**").

A. Hapja Johap

A hapja johap ("**partnership association**") is a business entity similar to a US limited partnership. A partnership association can be established upon an agreement among (i) one or more managing partners who agree to bear unlimited liability in the partnership association and (ii) one or more limited partners, whose liability is limited to their capital contribution in the partnership association. Unlike the more traditional jusik hoesa (joint stock corporation) or yuhan hoesa, a partnership association is not a separate legal entity but, instead, is recognized as an "association" authorized by law to engage in business (similar to johap).

The limited partnership agreement may provide for a ratio of allocation of profits and losses among its members which does not necessarily reflect the ratio of contribution to capital.

The managing partner has a fiduciary duty to the other partners to manage and represent the partnership association with care and loyalty. The managing partner may not sell, assign or transfer her interest in the partnership association to a third party without the unanimous consent of all partners. Limited partners must refrain from managing or representing the partnership association.

Tax issues are unsettled; however, many believe double taxation should not arise and a partnership association should receive pass-through tax treatment.

B. Yuhan Chaekim Hoesa

A yuhan chaekim hoesa ("**LLC**") is similar to a limited liability company in the United States or akin to a godo kaisha in Japan. The LLC can be established upon a capital investment by one or more persons and registration of its incorporation. Capital contributions can be made in cash or other tangible assets except hose whose reasonable market value is difficult to determine (e.g., services).

There is no minimum capital requirement to establish an LLC. While a manager is required (either a person or a legal entity), there is no mandate to have directors or an auditor.

A member is allowed to transfer her interests in the LLC to a third party with the consent of other members or if permitted in the LLC's articles of association. Unless otherwise stated in the articles of association, a member may obtain a refund of her investment in the LLC by exiting at the end of the LLC's fiscal year upon six (6) months' prior notice to the LLC, subject to certain restrictions.

Tax issues are unsettled; however, many believe the LLC will be treated similarly to a jusik hoesa.

Hapja johap and yuhan chaekim hoesa will likely appeal to small-sized companies or investors with limited objectives. The utilization of the new company vehicles, however, will depend much on their tax treatment.

COUNTRY UPDATE ON PORTUGAL

Country Update on Portugal

By Luís Pacheco Pires, Garrigues LLP, Lisbon/Portugal (lpp@garrigues.com)
and Luís Pedro Oliveira, Garrigues LLP, Lisbon/Portugal (luis.pedro.oliveria@garrigues.com)

Economic Background

Over the last few years Portugal (and several other countries of the Euro Area) has been under strong international and, particularly, EU pressure to correct its public finance disequilibrium.

After a period of great economic and social expansion, especially in the 90's due to the integration in the EEC/EU and the consequent access to structural and cohesion funds, Portugal has faced consecutive poor economic performances and a general loss of competitiveness in the last decade. In fact, and despite said economic growth, Portugal remained as one of the lowest per capita GDP countries in Western Europe and its unemployment rate has steadily increased, reaching 10.8% in 2010.

This fragile economic performance has dropped even more with the emergence of the 2008 global turmoil in the financial markets. In 2008, trying to cope with the global crisis, the Portuguese government, in line with other EU countries expected massive public investments to serve as a definitive driving force for economic recovery. Portugal launched several public investment programs, a few of them with a decisive impact on Portuguese public expenditure, notably the new Lisbon international airport and high-speed train links between Lisbon and Madrid, Lisbon and Oporto, Oporto and Vigo (which seems to be currently on hold). At the same time, the international turmoil unveiled serious director faults on a local credit institution (BPN – Banco Português de Negócios), leading the Portuguese government to nationalize it in order to prevent its collapse and also the possible contamination of other Portuguese financial institutions. Now BPN is about to be privatized by the Portuguese Government through a direct negotiation with Banco BIC (bank based in Angola).