INTERNATIONAL BUSINESS LAW COMMISSION

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Editorial:

Dear Readers

After having overcome several obstacles and just before the Budapest Congress, I am happy to announce that also the IBLC has its own Newsletter. I thank Renata Antiquera very much for her efforts which she put into this project and hope that it will flourish which in particular depends on you, dear IBLC member. You are very welcome to publish short and interesting articles within the broad range of IBLC concerning your jurisdiction. I and my successor as commission president, Anders Forkman, look forward to your inputs and comments.

Kind regards

Beat Brechbuehl
Commission President

In most cases, the payment of JCP may be considered advantageous, since the tax burden of the corporate entity (IRPJ plus CSLL) is 34%, which results in an economy of approximately 19 percentage points over the amount of the JCP.

The JCP payment is subject to the following conditions:

- it may not exceed the limit of 50% of the profit for the year;
- deductibility may not exceed the limit of 50% of the balance of accumulated profits existing on termination of the previous year; and
- it must be formally approved by the partners.

c) Return of the Investment

The foreign capital duly registered at the Central Bank may be repatriated in the corresponding foreign currency, in the following situations: when the foreign investor assigns and transfers its quotas/shares of a Brazilian company, when the company reduces its capital or when it is dissolved. Such remittances **are not subject to taxation**, unless in case the assignment and transfer of shares/quotas is effected for an amount higher than the one registered at the Central Bank. In such cases, Income Tax is withheld at source at a 15% rate on the amount surpassing the registered amount, since it is considered a capital gain.

From Canada:
By Larry Markowitz and Mark Opashinov, McMillan LLP

A New Era in Canadian Foreign Investment Review
Canada raises Investment Canada Act review thresholds, but introduces a national security override

A new era in Canadian foreign investment review is upon us. The Government of Canada recently made significant changes to the Investment Canada Act (ICA).

Non-Canadians who acquire control of an existing Canadian business or who establish a new Canadian business are subject to the ICA. Most proposed investments are subject to relatively simple notification requirements. Only those foreign investments that exceed specified thresholds are subject to pre-closing or post-closing review by the Minister of Industry (or, in the case of transactions involving cultural industries, the Minister of Heritage) to determine whether the investment is of “net benefit” to Canada.

The amendments to the ICA follow on the heels of the June 2008 Competition Policy Review Panel Report, which recommended, among other things, that the ICA be amended to reduce barriers to foreign investment by increasing review thresholds and increasing transparency, while preserving close oversight in the cultural sector. In addition, the legislative changes implement the Government's previously announced plan to provide for review of foreign investments that could be "injurious" to national security, regardless of the size of the transaction.

Higher threshold for review

The new ICA threshold will come into force on a date to be determined by the Federal Cabinet. The current threshold for review of direct acquisitions by investors from World Trade Organization member-countries is a book value of C$312 million for the Canadian target. This threshold will rise to an "enterprise value" of C$600 million during the two years after the amendments come into force; to C$800 million for investments made during the third and fourth years after the amendments come into force; and, finally, to C$1 billion for investments made between the fifth year after the amendments come into force and December 31 of the sixth year after the amendments come into force. This threshold will be indexed to inflation thereafter.

The Competition Policy Review Panel recommended changing the financial measure on which the threshold for review is based from book value, which it considered to be an "old economy" measure, to the target's "enterprise value", to better reflect the increasing importance of service- and knowledge-based industries, in which much of the value of an enterprise may not be recorded on its balance sheet. Draft regulations published in June 2009 set out a process for calculating enterprise value. Where shares of the target business are publicly traded, the enterprise value will be equal to the market capitalization of the entity, plus its liabilities, minus its cash and cash equivalents. For acquisitions of control of a Canadian business that is not public, its enterprise value will be equal to the most recent year-end book value of the acquired assets.

While the deduction of current cash assets makes the rise in the review thresholds even more pronounced, the move from an accounting-based to a market-based measure of value will catch some transactions that would not otherwise have been reviewable.

Prior to the recent amendments, there were four "sensitive" policy sectors where the threshold for review of direct acquisitions of Canadian businesses was C$5 million and indirect acquisitions of foreign corporations were reviewable if they had Canadian subsidiaries with assets exceeding C$50 million. These sectors were uranium, financial services, transportation services and cultural businesses. Now that the ICA has been amended, only cultural businesses will continue to be subject to the lower review thresholds (and the Government's discretion to order a review of below-threshold transactions in this sector will also be retained). The other three "sensitive" sectors have been eliminated.

However, the very broad "national security" provision that has been added to the ICA could be used to compel reviews of uranium, financial services and transportation sector transactions in certain circumstances. In addition, transactions in the financial services and transportation areas may be subject to review under sector-specific regimes.

Increased transparency

If the relevant Minister decides that a transaction is not of net benefit to Canada, he or she will be required to provide reasons for the decision. If the Minister decides that a transaction is of net benefit to Canada, he or she may (but will not be required to) provide reasons for the decision and allow these reasons to be made publicly available. We are confident that meaningful reasons can be provided while respecting the confidentiality of commercially sensitive information. If, as we would hope, the reasons are publicly disclosed as a matter of course, we would anticipate that the increased transparency would have the salutary effect of establishing precedents against which the "net benefit to Canada" of proposed transactions could be evaluated.

National security

Among major industrialized nations, Canada was unusual in not having a mechanism to block an investment that could threaten national security. The recent amendments fill this gap in Canada's foreign investment review framework. National security will effectively be defined in a wide sense, since the Federal Cabinet will be empowered to review, and ultimately to block, any investment it considers "could be injurious to national security".

No specific definition of national security is provided in the ICA. However, the draft regulations do contain a list of government agencies with which the Investment Review Division can share information for the purpose of administering or enforcing the ICA's national security review provisions. These agencies include obvious candidates such as the Canadian Security Intelligence Service and the Department of National Defence, but also include agencies such as the Department of Natural Resources, the Department of Transport, the Public Health Agency of Canada and the Department of Finance. Based on this list, it appears that the Government plans to take a broad view of the types of transactions that could be injurious to national security.

It is therefore possible that national security grounds might be invoked to review investments by non-Canadians in areas as diverse as mining (particularly uranium and other materials of military importance), finance, transportation, ports, electricity, oil and gas, and pipelines. It is even conceivable that national security grounds could be invoked to block an investment the Federal Cabinet feels might result in damage to the environment – for instance, if a foreign investor in primary resource exploration intends to employ exploration techniques that could potentially be harmful to air quality or the water supply.

Concluding observations

These changes to the ICA represent an improvement over Canada's previous foreign investment review regime. As a result of the significantly higher thresholds and the removal of the very low "sensitive" sector threshold for all sectors except culture, we anticipate significantly fewer Applications for Review under the ICA. As for those few deals that will remain subject to mandatory review or are subjected to review under the "national security" provisions, we are encouraged by the plan to increase the transparency of the decision-making process.

It is still too early to predict how the national security review process will operate in practice. The lack of definitional limits may create a risk of political interference in unpopular transactions. However, the relatively uneventful history of the ICA demonstrates that Canadian Government intervention in foreign investments has been exceedingly rare and, by and large, Canada has been very welcoming to foreign investors. We hope this approach will continue to prevail.

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From Switzerland:
By Beat Brechbühl/Martin Kistler, Kellerhals

Swiss takeover law revised

As of 2009, the Federal Act on Stock Exchanges and Securities Trading (SESTA) and related ordinances have been significantly amended with respect to public tender offers to reflect precedents of the Takeover Board and new developments in the financial markets. The major changes can be summarized as follows:

Mandatory Offers

If the obligation to launch an offer was triggered by a purchase of shares fully or partially paid in cash, the consideration to be offered in the mandatory offer can only consist of securities if the offeror also offers a cash alternative.

Strengthening of Shareholder Rights

Under the revised law, every shareholder holding of 2% or more of the target's voting rights, whether exercisable or not, can be a party in the proceedings before the Takeover Board. These qualified shareholders have to apply to the Takeover Board or timely raise an objection to be admitted as a party. As a party, they are entitled to participate in the proceedings, have access to the Takeover Board's file and are entitled to challenge such orders.