International Business Acquisitions

Major Legal Issues and Due Diligence

Fourth Edition

Editors

Michael Whalley and Ralf Kurney

A World Law Group Publication

World Law Group

Wolters Kluwer

Law & Business

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Foreword

Purpose

This fourth edition of *International Business Acquisitions* (the Handbook) is intended as an easily accessed desk reference for lawyers, business executives and others concerned with the acquisition of the securities or business assets of a company located outside their own national jurisdiction. It is also directly relevant to those representing the sellers in such transactions, as they must anticipate and prepare for the foreign buyer's requirements and concerns.

Despite occasional set-backs in the pace of mergers and acquisitions activity, the number and diversity of international acquisition transactions continues to increase, reflecting the need for every successful company to develop or acquire the resources to compete on an international scale. Many local business enterprises have discovered, often to their surprise and detriment, that this need to acquire or be acquired by foreign companies is no longer limited to large multinational groups. The World Trade Organisation, regional and bilateral trade agreements, instant worldwide communication, internationalisation of management, the spectacular growth of what were previously third-world economies, the reduction of language barriers and other factors have created a worldwide marketplace, where companies will compete primarily on the basis of economic efficiency. International acquisitions, to access foreign markets, to provide foreign production or marketing capacity, to obtain regulatory approvals, to acquire complementary product or service lines or simply to spread product, service or market risk and to reduce costs, have become the norm.

In addition, there has been an explosion in venture capital and private equity driven acquisitions, their aim generally being to identify and exploit underperforming assets or businesses (at the same time giving an outlet to companies wishing to divest themselves of such assets and businesses which are no longer central to their strategies, generally being described as 'non-core'). The high gearing (debt finance) of these acquisitions puts enormous pressure on management and investors to make assets and businesses perform quickly so as to realise value for investors through a subsequent trade sale or IPO (initial public offer), itself leading to further acquisition

activity. This constant striving to achieve the most efficient return on assets and investments in business could be described as the virtuous circle of mergers and acquisitions activity.

Regrettably or fortunately, depending upon one's perspective, the legal practices, requirements and pitfalls relevant to cross-border transactions, despite significant harmonisation within the EU, continue to be aggressively and uniquely national in character. This reflects not only historical differences in the development of national systems, but also differences in cultural priorities and business practices which inevitably affect the negotiation, documentation and implementation of an international acquisition transaction. By way of example, it is interesting to note that substantial acquisition transactions in Italy are often completed with little or no written documentation – a situation beyond the comprehension of most lawyers from common law jurisdictions. Nevertheless, the influx of US and English law firms into most European jurisdictions, often following in the footsteps of their multinational clients, has introduced increasingly common standards and documentation, and it could be argued that we are now seeing a much more global, and therefore consistent, approach not only in the process and procedures used to effect an acquisition in many different jurisdictions but also in the documentation being used.

The need for a clear understanding of the major legal issues and careful, informed due diligence are even more important in international acquisitions than in domestic transactions, where both parties have a relatively good understanding of the legal and business environment. Consequently, legal practitioners and many others involved in cross-border acquisitions need a user-friendly source of information covering the more important jurisdictions. This Handbook is intended to meet this need.

Concept to Publication

This Handbook is the result of a World Law Group project which was conceived and implemented by the WLG International Corporate Transactions Practice Group. Special recognition must be given to those who recognised the value of this Handbook, shaped the content and assured its consistent high quality.

Initial encouragement and guidance came from Kingston Berlew, the first President of the World Law Group and a former Chairman of the International Corporate Transactions Practice Group.

Thomas Heymann, then a partner of the firm now known as Taylor Wessing (Germany), and Michael Whalley of the Australian firm Minter Ellison served as both authors and editors for the first edition, writing, in large part, both the introductory chapter and the due diligence chapter, on which the individual country annotations are based. They and Franz-Jörg Semler, Thomas Heymann's successor as editor for both the second and third editions, were also responsible for legal editing of the country annotations and the country-by-country analysis of major legal issues which appears in Chapter 2. Their respective backgrounds in civil and common law were instrumental in making it possible for the Handbook to cover international business acquisitions without having entirely separate sections for common law and civil law jurisdictions.

Leigh Brown of Minter Ellison was the first to recognise the need to cover major legal issues separately from due diligence, and was instrumental in producing the initial Australian version of the major legal issues section which, together with the German version, served as a model for other country contributions.

Individual international business lawyers in each of the member firms contributed to the preparation of the country-by-country analysis of major legal issues and to the refining and country annotations of the due diligence section. The time and effort required to complete this work, despite competing business and family demands, is recognised and greatly appreciated.

The World Law Group

The World Law Group decided to carry out this ambitious but practical project primarily because the lawyers involved believed that the Handbook would be a valuable tool for many of our own firms, enabling them to respond more effectively to client needs and to interact more easily with the other member firms. Often, in the international business acquisitions context, the need for speed and responsiveness is indispensable and the Handbook should greatly facilitate that capability. At the same time we, and our publisher Kluwer Law International, concluded that the Handbook would also be valuable to clients and others involved in cross-border acquisitions.

Since this Handbook is the result of a cooperative effort by most of the WLG member firms, a brief description of the Group is in order. Member firms are independent, and have not 'merged' or 'combined' by joining the WLG, and each firm is solely responsible for its own work. There are currently 52 member firms with more than 15,500 lawyers in 69 countries and more than 200 international business centres.

The primary purpose of the World Law Group is to develop, maintain and coordinate the capabilities and resources required to provide high-quality, efficient legal services to international clients located throughout the world. We believe that bringing together in one group the legal knowledge, experience, resources and contacts of independent firms which represent the best in their communities and countries is the best way to accomplish this objective. The WLG is non-exclusive, which means that, while members are encouraged to refer matters to, and consult with, other WLG members, there is no policy that referrals go only to the WLG member in a given jurisdiction, nor are there any referral fees.

Practice Groups have been established in several areas including:

- Antitrust and Competition.
- Corporate Governance.
- Energy, Mining & CleanTech.
- Human Resources Law.
- Infrastructure & Public-Private Partnerships.
- Intellectual Property & Information Technology.
- International Corporate Transactions.

- Litigation, Arbitration & Dispute Resolution.
- Privacy Matters.

These Practice Groups bring together lawyers with similar interests and clientele to share information and ideas, to work on projects such as this Handbook and to establish effective working relationships which are necessary for providing quality international legal services to our respective clients.

Legal counsel in the relevant jurisdiction(s) should be consulted both for the updating and application of applicable laws and regulations to specific matters.

Michael Whalley
WLG Handbook Series Editor

Editors' Preface to the First Edition

The process of compiling and editing a handbook which brings together contributions from a number of jurisdictions throughout the world inevitably leaves the editors with some valuable insights and impressions. The common format of each of the country contributions, and the way in which each contributor has been forced, often somewhat reluctantly, to summarise what are often complex legal issues, makes comparison easier.

At the same time, the need for simplicity and a common format has its dangers. Legal issues do not always fall happily into convenient pigeon holes, and some issues have a habit of emerging in a number of different contexts. The rights of creditors and employees are obvious examples.

The editors have been struck by the surprising uniformity in the principles which underpin business laws throughout the world. Laws which on first glance appear very different often turn out to be very similar, differences only arising from the different use of language or expression. For example, a number of civil law jurisdictions use the term 'limited liability company' only in the context of a family or private company. This can sometimes leave the reader with the impression that a public company does not have limited liability but this is, clearly, not the case.

There have been inevitable difficulties in trying to render each contribution into a common grammatical style. The written and spoken English of each of the handbook's contributors is, without exception, excellent, but rules of grammatical construction differ enormously throughout the world, and this is often reflected in the contributions. The editors hope that their attempts to give the text a common grammatical flow have not robbed each contribution completely of the style of its own author.

Readers will obviously draw their own conclusions from comparing the treatment of different issues by different jurisdictions. However, the editors have noted some interesting similarities or differences, some of which include:

- a number of civil codes provide that a seller of a business may not compete with the buyer after the sale, but no such restriction is generally imposed in common law jurisdictions;

- a purchaser of a business as a going concern (described in France, for example, as a *fonds de commerce)* can, in some jurisdictions, also inherit business liabilities even though these are not specifically dealt with in the agreement;
- the laws of different trading blocks are having an increasing influence over national laws: while other trading blocks do not have the same law-making powers as those enjoyed by the EU, the influence of international trade agreements over domestic business laws should not be underestimated;
- there has been almost universal abolition of exchange controls in the jurisdictions covered, which also largely welcome foreign investment (although still with a high level of government monitoring and, in some cases, interference, particularly in the case of 'sensitive' industries);
- civil jurisdictions appear to place an obligation on the parties to negotiate in good faith, but this is rare in common law jurisdictions;
- most jurisdictions seem to recognise and enforce non-competition covenants by both sellers and employees, provided they are reasonable;
- there is remarkable consistency in the principles which underlie competition laws throughout the world; and
- there is also surprising consistency in the issues which are relevant to a choice between buying shares or assets, the only notable exception being the issue as to whether the relevant jurisdiction requires the buyer of business assets to bear full responsibility for all of the employees of the business.

More extensive analysis may have to await a future edition. The catalyst for a new edition will, of course, be the response of readers, and the extent to which this handbook becomes a useful and continuing reference work.

Michael Whalley
London
Thomas Heymann
Frankfurt am Main
January 1996

Editors' Preface to the Fourth Edition

Eighteen years after the publication of the successful first edition of the International Business Acquisitions Handbook, six years after the third edition was published, and in the face of continuing strong demand for an easily accessible source of information on cross-border acquisitions, we offer this fourth edition to bring our readers up to date with developments in mergers and acquisitions laws in many jurisdictions around the world.

Like the third edition, the fourth benefits from both updating and substantial expansion of content. We are pleased to welcome additional contributors from Chile, Costa Rica, Indonesia, Poland, Russia, Thailand and Turkey, making a total of forty jurisdictions (plus the two special chapters on the laws of the European Union) now covered by this handbook.

This edition welcomes a new contributing co-editor from CMS Hasche Sigle, Mr Ralf Kurney, assisted by Claire Lamont. Thanks must be extended to previous co-editors Franz-Jörg Semler and Thomas Heymann, whose efforts have been instrumental in the evolution and success of the International Business Acquisitions Handbook.

In the editing process, we have noticed some significant new developments impacting upon cross-border acquisitions in a number of jurisdictions. Some of note include:

(a) the continuing movement away from defined benefit (final salary) pension plans has in many cases reduced the risk of a target being exposed to under-funding liabilities, and thus the risk for buyers, but many jurisdictions have adopted statutory regimes for employee pension provision, adding further costs to business but creating significant long-term benefits for employees;
(b) the drive towards trying to eliminate bribery and corrupt practices continues;
(c) many countries that have previously not had sophisticated competition and anti-trust (merger) regimes are increasingly adopting them;
(d) more particularly:

(i) *Australia's* new Personal Property Securities Act 2009, a new regime for almost all forms of security over assets, has had a profound effect on the registration of company charges and encumbrances, making due diligence enquiries more complex.

(ii) *Austria* is making potential changes to its tax grouping laws and imposing new restrictions on claiming depreciation on acquired goodwill and has introduced a pre-closing approval requirement for certain direct investments of at least 25% if the target company operates in a sensitive market segment (industries relevant to Austria's national and international security) where the investment originates from countries outside the European Economic Area.

(iii) *Argentina* has imposed new restrictions on the purchase by foreign interests of large land holdings and has made changes to the tax regime for dividends and the sale of unlisted shares.

(iv) In *Brazil*, mandatory prior approval is now required from the Council for Economic Defence (*ConselhoAdministrativo de Defesa Econômica* or CADE) anti-trust agency in cases that exceed the *de minimis* examination thresholds.

(v) *Canada* has relaxed its foreign investment restrictions (by applying significantly higher examination thresholds) for WTO member country resident investors, but has imposed new restrictions on investment by state owned enterprises.

(vi) As expected, *China* continues to open up its economy to foreign investment and has introduced new protections for Foreign Invested Enterprises, has made reforms to its companies laws in relation to paid up capital and has simplified a number of foreign exchange procedures and approvals.

(vii) *Denmark* has introduced a new form of corporate entity for entrepreneurial businesses.

(viii) In the *United Kingdom*, a new Competition and Markets Authority has been created, taking over responsibility for monitoring merger activity in the UK from the Office of Fair Trading, a new regime for the auto-enrolment of employees into occupational pensions has begun, and the restriction on private companies providing financial assistance for the purchase of their shares has been removed.

(ix) As with many countries trying to attract foreign investment, *France* has eased its registration requirements for foreign managers and its requirements for government authorisation for controlling stakes in French companies that are not in sensitive sectors; it has also modernised its competition law, putting this in the hands of a new Competition Authority.

(x) *India* has a substantial new companies law, new takeover regulations and a new competition review regime.

(xi) Similarly, *Israel* has adopted a new concentration (competition) law, designed to reduce economy wide business concentrations, and has

made changes to its company insolvency regime by introducing a US Chapter 11 style reconstruction procedure, with concomitant changes to creditors rights.

(xii) As part of its introduction of competition laws, *Malaysia* has created a new competition commission, the MyCC.

(xiii) *The Netherlands* legislators have been busy, creating new simplified and flexible arrangements for the capital structure of BVs (the new 'Flex BV'), introducing the ability to have a one-tier board and at the same time imposing quotas for the appointment of women to boards and senior management positions and restricting the number of supervisory board positions that an individual can hold, and restricting the ability to impose non-compete restrictions on certain employees.

(xiv) *Norway* has introduced thin capitalisation rules restricting the deductibility of interest on inter-company borrowing (which includes external debt guaranteed by a group company).

(xv) In *Portugal*, there have been a number of changes in company and securities laws in the period since 2007, including to transparency and disclosure rules and rules for the protection of investors in the context of IPOs, investment consultancy, hedge funds and collective investment undertakings.

(xvi) Our new chapter on *Russia* is timely, updating us on improved recognition of shareholder agreements and attempts to give legal standing to put and call options over Russian securities and participation interests, highlighting difficulties for entering into conditional agreements which cannot be notarised, limiting statutory exit rights for minority shareholders and noting the introduction of a Strategic Investment Law regulating foreign investment in 'strategic industries'.

(xvii) *Scotland* is to take advantage of its devolved powers by taking more control of taxation, particularly stamp duties on land transactions.

(xviii) *Spain* has made major reforms in company and takeover laws, with a new Companies Structural Changes Act in 2009 dealing with structural changes to companies (transformation, merger, division, divestiture, and global transfer of assets and liabilities), regulated intra-community cross-border mergers and international transfers of registered offices, a restatement of all companies laws in 2010, changes to takeover laws in 2012 and amendments to the Spanish Insolvency Act, opening up new alternatives for selling businesses in insolvency proceedings through streamlined procedures, avoiding the impairment and depreciation of businesses.

(xix) *Sweden* has also introduced new competition laws, under the powers of the Swedish Competition Authority, and has made changes to the prospectus laws, bringing them in line with the recent changes to the EU Prospective Directive.

(xx) *Switzerland* has introduced new laws governing the intermediation of certificated and non-certificated securities by custodians, has also abolished nationality and resident requirements for directors of Swiss companies (although there must still be at least one person able to represent the company who is domiciled in Switzerland) and has increased shareholder control over director and senior management compensation in listed corporations.

Our chapter on due diligence has again been revised and expanded, with the commentary recognising that due diligence now has many and varied purposes. The spectacular growth of private equity investment vehicles as major players in the international mergers and acquisitions space is an example. Advisers now need to pay as much attention to their audience's aspirations and concerns as to the target itself. Due diligence enquiries must also now be extended to new areas of law, such as those governing the internet and email marketing, ownership and use of social media, privacy and the need to maintain personal information on a confidential basis, and those which require companies to ensure that they have procedures in place to prevent money-laundering and bribery (or corrupt practices).

This edition has been updated by each of our contributors to reflect the law in force in their respective jurisdictions as at 31 January2014. We hope this latest edition will serve as a valuable resource to its readership but, as always, this Handbook is intended only as a guide, and proper legal advice should always be sought when any actual transaction is contemplated.

Michael Whalley
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July 2014

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