
THE
INTERNATIONAL
CAPITAL
MARKETS REVIEW

FOURTH EDITION

EDITOR
JEFFREY GOLDEN

LAW BUSINESS RESEARCH

THE INTERNATIONAL CAPITAL MARKETS REVIEW

The International Capital Markets Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The International Capital Markets Review - Edition 4
(published in November 2014 – editor Jeffrey Golden).

For further information please email
Nick.Barette@lbresearch.com

THE
INTERNATIONAL
CAPITAL
MARKETS REVIEW

Fourth Edition

Editor
JEFFREY GOLDEN

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITORS
Jo Morley, Anna Andreoli and Caroline Rawson

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2014 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2014, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-30-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMA ET GRETTE DA

AFRIDI & ANGELL LEGAL CONSULTANTS

ALLEN & OVERY LLP

ATTORNEYS AT LAW BORENIUS LTD

BBH, ADVOKÁTNÍ KANCELÁŘ, S.R.O.

DE PARDIEU BROCAS MAFFEI

ENSAFRICA

FENXUN PARTNERS

INTERNATIONAL COUNSEL BUREAU

KIM & CHANG

KING & WOOD MALLESONS

KOLCUOĞLU DEMİRKAN KOÇAKLI ATTORNEYS AT LAW

LOYENS & LOEFF NV

MAKES & PARTNERS LAW FIRM

MAPLES AND CALDER

MEYERLUSTENBERGER LACHENAL ATTORNEYS AT LAW

MIRANDA & AMADO ABOGADOS

MKONO & CO ADVOCATES

MNA MARTINEZ ABOGADOS
MONASTYRSKY, ZYUBA, STEPANOV & PARTNERS
MORRISON & FOERSTER LLP / ITO & MITOMI
OPPENHOFF & PARTNER
PINHEIRO NETO ADVOGADOS
PLESNER
P.R.I.M.E. FINANCE FOUNDATION
REED SMITH
RUSSELL McVEAGH
SIDLEY AUSTIN LLP
SYCIP SALAZAR HERNANDEZ & GATMAITAN
UGHI E NUNZIANTE STUDIO LEGALE
URÍA MENÉNDEZ ABOGADOS SLP
VIEIRA DE ALMEIDA & ASSOCIADOS,
SOCIEDADE DE ADVOGADOS RL

CONTENTS

Editor's Prefaces	vii
<i>Jeffrey Golden</i>	
Chapter 1 AUSTRALIA.....	1
<i>Ian Paterson</i>	
Chapter 2 BELGIUM.....	21
<i>Sylvia Kierszenbaum and Willem Van de Wiele</i>	
Chapter 3 BRAZIL	36
<i>Ricardo Simões Russo, Gustavo Ferrari Chauffaille and Luiz Felipe Fleury Vaz Guimaraes</i>	
Chapter 4 CHINA.....	45
<i>Xusheng Yang</i>	
Chapter 5 COLOMBIA.....	60
<i>Camilo Martínez Beltrán, Luis Miguel Falla Zúñiga and Luis Hofmann Delvalle</i>	
Chapter 6 CZECH REPUBLIC.....	69
<i>Tomáš Sedláček and Zdeněk Husták</i>	
Chapter 7 DENMARK.....	80
<i>Jørgen Permin, Emil Deleuran, Jef Nymand Hounsgaard and Simon Skjold Jensen</i>	
Chapter 8 EU OVERVIEW	92
<i>Oliver Kessler and Stefanie Zugelder</i>	
Chapter 9 FINLAND	107
<i>Ari-Pekka Saanio</i>	

Chapter 10	FRANCE	117
	<i>Antoine Maffei and Olivier Hubert</i>	
Chapter 11	GERMANY	141
	<i>Kai A Schaffelhuber</i>	
Chapter 12	INDONESIA.....	152
	<i>Yozua Makes</i>	
Chapter 13	IRELAND.....	164
	<i>Nollaig Murphy</i>	
Chapter 14	ITALY	180
	<i>Marcello Gioscia and Gianluigi Pugliese</i>	
Chapter 15	JAPAN	195
	<i>Akihiro Wani and Reiko Omachi</i>	
Chapter 16	KOREA.....	209
	<i>Myoung Jae Chung, Hyunsoo Doh and Nina Sun Young Ju</i>	
Chapter 17	KUWAIT	221
	<i>Abdullah Al Kharafi and Abdullah Alharoun</i>	
Chapter 18	LUXEMBOURG	233
	<i>Frank Mausen and Henri Wagner</i>	
Chapter 19	NETHERLANDS	254
	<i>Mariëtte van 't Westeinde and Martijn Schoonewille</i>	
Chapter 20	NEW ZEALAND	269
	<i>Deemple Budhia and John-Paul Rice</i>	
Chapter 21	NORWAY	283
	<i>Andreas O Myrstad and Johan C Kongslı</i>	
Chapter 22	PERU	299
	<i>Juan Luis Avendaño C and Nydia Guevara V</i>	

Chapter 23	PHILIPPINES309 <i>Maria Teresa D Mercado-Ferrer, Joan Mae S To and Earla Kahlila Mikhaila C Langit</i>
Chapter 24	PORTUGAL.....324 <i>Orlando Vogler Guiné, Ana Moniz Macedo and Sandra Cardoso</i>
Chapter 25	RUSSIA.....335 <i>Vladimir Khrenov</i>
Chapter 26	SOUTH AFRICA.....351 <i>Clinton van Loggerenberg and Stephen von Schirnding</i>
Chapter 27	SPAIN364 <i>David García-Ochoa Mayor and Daniel Pedro Valcarce Fernández</i>
Chapter 28	SWITZERLAND376 <i>Christoph Heiz, Wolfgang Müller and Marc Schamaun</i>
Chapter 29	TANZANIA.....387 <i>Kamanga Wilbert Kapinga and Kenneth Mwasi Nzagi</i>
Chapter 30	TURKEY395 <i>Umut Kolcuoğlu, Kemal Aksel and Begüm İnceçam</i>
Chapter 31	UNITED ARAB EMIRATES.....404 <i>Gregory J Mayew</i>
Chapter 32	UNITED KINGDOM.....416 <i>Tamara Box, Ranajoy Basu, Nick Stainthorpe, Caspar Fox, Roy Montague-Jones, Jacqui Hatfield and Winston Penhall</i>
Chapter 33	UNITED STATES439 <i>Bart Capeci</i>
Appendix 1	ABOUT THE AUTHORS.....449
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS...471

EDITOR'S PREFACE TO THE FOURTH EDITION

It is good of the publishers to include in this volume the Editor's Preface to each of the previous editions of *The International Capital Markets Review*. Reading through these is like an archaeological dig.

The first begins with a somewhat nervous look-back over the shoulder at the then-recent financial crisis. An expression in that preface of admiration for the 'resilience' of the markets sounded at the time more a hope and expectation than a certainty or done deal.

In the second, further signs that a 'big freeze' on capital market transactional work was 'thawing' were noted; however, the challenge of new and voluminous regulation, as much as the potential for deal flow, made this publication of particular relevance when that edition appeared.

By the time the third preface was written, the major global financial institutions were hiring again, but we were still looking for hard evidence or 'confirmation' that an uptick in deal flow lay ahead and that the extra staffing was in anticipation of opportunity rather than more simply a reaction to a compliance burden.

Now, as I put pen to this Editor's Preface to the fourth edition of the work, we have just witnessed the successful launch of the world's largest-ever stock flotation. Alibaba shares soared 39 per cent on the first day of trading and, after the bankers exercised a greenshoe option, raised US\$25 billion. Meanwhile, *The Times* reports a buoyant London braced for a 'listing stampede'. Hong Kong is rivalling New York for the greatest number of cross-border deals. The *Financial Times* also reminds us that in fact, measured by deal value, year-to-date listings in New York have raised twice as much as in London and Hong Kong combined – the fastest pace since 2000. A corner turned? Hopefully, we are seeing real opportunity, at least for the informed ICM lawyer. As in the past, this book seeks to keep at the ready for just such an ICM lawyer relevant analysis as a means for staying on top of an ever-expanding flow of necessary information.

New capital market regulation increases exponentially, and often purports to have extraterritorial reach. More than half of the Dodd-Frank rulemakings have now been finalised but nearly a quarter of the rulemaking requirements are still yet to be proposed. This past year has also been a busy period for regulatory reform at the European level and in other key jurisdictions covered in this volume. Notably as well, courts around the world have been building up a significant jurisprudence in disputes involving complex products and other capital market structures. We have almost certainly seen more ISDA

contract cases since this book first appeared than in all the years that preceded that first edition put together.

Not surprisingly then, this volume keeps getting 'fatter'. Soon the publishers will have to provide wheels for the book! What started as coverage of 19 relevant jurisdictions, now surveys 33 – five of which (Colombia, Kuwait, Norway, Peru and Portugal) are included for the first time.

There has, however, certainly been no dilution in the quality of contributions. Someone clever once said that you are only as good as the company that you keep, on which basis the reader can feel very good indeed when turning to the lawyers and law firms that share their collective experience in the pages that follow. It remains a privilege and an honour to serve these contributors as their editor.

I am confident that the latest surveys that follow will prove useful to our practitioner readers, and I will not be surprised if a few legal archaeologists among those get to excavating beyond the prefaces and examine the strata of the jurisdictional landscapes of earlier editions as they aim to equip themselves for their professional journeys ahead. Who knows? One of you may even be an Indiana Jones, who, armed with the information herein, may be tempted to grab that bullwhip and fedora and undertake a particularly ground-breaking transactional adventure or two. Indeed, it may even be that those adventures form part of the ICM story when it gets told in future editions of *The International Capital Markets Review*!

Jeffrey Golden

P.R.I.M.E. Finance Foundation

The Hague

November 2014

EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden

P.R.I.M.E. Finance Foundation

The Hague

October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and ‘cherry-pick’ best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden

London School of Economics and Political Science

London

November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding US\$700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than US\$180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to

facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden

London School of Economics and Political Science

London

November 2011

Chapter 29

TANZANIA

*Kamanga Wilbert Kapinga and Kenneth Mwasi Nzagi*¹

I INTRODUCTION

The securities market in Tanzania emerged in the 1990s as a result of the government's policy to liberalise the Tanzanian financial sector. The Capital Markets and Securities Authority (CMSA) was established by the Act of 1994² for the purpose of 'promoting and facilitating the development of an orderly, fair and efficient capital market and securities industry in Tanzania'.

Alongside the Capital Markets and Securities Act of 1994 (which applies to both Tanzania Mainland and Zanzibar) the Banking and Financial Institution Act of 2006³ (BFIA) has also been enacted with the aim of maintaining the stability, safety and soundness of the financial system. The provisions of the BFIA apply to all banks and financial institutions, and where there is a conflict between the BFIA and any provision of any law establishing a bank or financial institution, the provisions of the BFIA prevail. The BFIA also provides that any income earned from investment in two-year treasury bonds is subjected to withholding tax. Yet income on investments in five-year, seven-year and 10-year vehicles is exempted from withholding tax. All applicants exempted from paying withholding tax must provide to the Bank of Tanzania (BOT) tax exemption certificates from the Tanzania Revenue Authority (TRA), which is responsible for the administering of the central government taxes as well as several non-tax revenues and was established by the Act of Parliament No. 11 of 1995.

1 Kamanga Wilbert Kapinga is an associate at Mkono & Co Advocates and Kenneth Mwasi Nzagi is a legal officer at the Capital Markets and Securities Authority of Tanzania.

2 The Capital Markets and Securities Act, 1994 (Act No. 5 of 1994 as amended by Act No. 4 of 1997).

3 The Banking and Financial Institution Act of 2006 (Cap. 342).

The Dar es Salaam Stock Exchange (DSE), which is responsible for the trading of shares and bonds, is regulated by the Dar es Salaam Stock Exchange (Foreign Investors) Regulations⁴ and the Capital Markets and Securities Act.⁵ It was established in 1996 as a secondary market for both equity and debt securities and its primary aim is to provide a responsive security that will advance and liberalise Tanzania's economic and financial sectors.

As of 16 September 2014, the DSE had 14 listed companies and six cross-listed companies worth over US\$5 billion. This is as a result of the cross-listing of Uchumi Supermarkets Plc of Kenya on the Main Investment Market Segment and the listing of Swala Oil & Gas Tanzania Plc and Maendeleo Bank Plc on the new Enterprise Growth Market (EGM) segment of the DSE. Mergers and acquisitions involving public listed companies are governed by the Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations 2006 (the Regulations), which came into force in December 2006. The Regulations mainly apply to acquisitions of an interest of between 20 and 75 per cent in public or listed companies and to mergers meeting such thresholds. A specialised committee, the Prospectus Evaluation Committee, is responsible for reviewing applications, pending the creation of a specialised Mergers and Acquisitions Committee. The Regulations contain:

- a* lengthy and detailed provisions that ensure a transparent and efficient offering system;
- b* restrictions on dealings before, during and after the offering; and
- c* shareholder disclosure requirements.

The acquisition of an interest of more than 90 per cent triggers the mandatory takeover and delisting sections of the Regulations. This means that the acquirer must either make a mandatory public takeover offer to all shareholders of the target or disinvest through an offer for sale or by a fresh issue of capital to the public to fall below the threshold.

In 2014 there have been extensive discussions between capital markets stakeholders to scrap the limitations on foreign ownership of listed stocks. Within the Regulations foreign investors are defined as a person who or a body corporate that intends to acquire or has acquired securities in a listed company, but are not in the case of an individual, a citizen of Tanzania, and in the case of a body corporate, a body corporate in which more than 50 per cent of its shareholding is held by persons who are not citizens of Tanzania, or a body corporate not incorporated in Tanzania.

As a result of those discussions foreign investors are no longer subjected to the limits prescribed in the Capital Markets and Securities (Foreign Investors) Regulations.⁶ Through its efforts to liberalise the Tanzanian capital account in line with implementation of the East African Common Market Protocol, the BOT has amended the Foreign Exchange Regulations by lifting restrictions on the foreign participation in government

4 Regulated by the Dar es Salaam Stock Exchange (Foreign Investors) Regulations, 2003.

5 The Capital Markets and Securities Act, 1994 (Act No. 5 of 1994 as amended by Act No. 4 of 1997).

6 Capital Markets and Securities (Foreign Investors) Regulations 2002.

securities to the extent of 40 per cent and completely removing restrictions on foreign investors with regards to listed securities.

These amendments were published by the BOT in the Government Gazette GN. No. 133 on 2 May 2014. The Foreign Exchange (Listed Securities) (Amendments) Regulations 2014 provided, *inter alia*, that:

- a* non-residents can participate in listed securities in Tanzania, except for government securities (Regulation 3(1)); and
- b* non-residents from East African can participate in government securities up to 40 per cent of the amounts issued but none one of the East African countries can exceed two-thirds of the 40 per cent (Regulation 3(2)).

Listed securities are governed by the Capital Markets and Securities (Foreign Investor) Regulations 2003, which restricts foreign investor participation on listed securities to 60 per cent and restricting participation in listed government securities. As part of enforcement, the amendments issued by the BOT required corresponding amendments to the CMSA regulation. Our research indicates that the amended Regulations have been submitted and signed by the Minister of Finance and are now in force.

The incentives to promote the participation of foreign investors in the capital markets sector remain the same, and are as follows:

- a* zero capital gain tax as opposed to 10 per cent for unlisted companies;
- b* zero stamp duty on transactions executed at the DSE compared to 6 per cent for unlisted companies;
- c* withholding tax of 5 per cent on dividend income as opposed to 10 per cent for unlisted companies;
- d* zero withholding tax on interest income from listed bonds whose maturities are three years and above;
- e* exemption of withholding tax on income accruing to fidelity funds maintained by the DSE for investor protection; and
- f* income received by Collective Investment Scheme (CIS) investors is tax-exempt.

i Local agencies' and the central bank's respective roles

The BOT acts as a banker and as a fiscal agent to Tanzania and the government of Zanzibar. The BOT issues treasury bonds on behalf of the two governments. The treasury bonds offered have maturities of two years, five years, seven years or ten years; they are issued at a fixed interest rate and quoted at premium or par value.⁷

The CMSA is the industry regulatory and supervisory body on the capital markets, which licenses and regulates investment intermediaries and deals with exchanges with the issuance of and trade in securities. The CMSA has since promulgated a number of rules and regulations including those covering guidelines for the issue of corporate bonds and commercial paper, cross-listing disclosure guidelines, etc.

7 African Bond Markets: www.africanbondmarkets.org/countries/east-africa/tanzania/overview/69/.

ii Structure of the courts, including any relevant specialist tribunals; trends reflected in decisions from the courts or other authorities

The High Court of Tanzania, Commercial Division is responsible for cases dealing with capital markets. Section 5(2) of the High Court (Commercial Division) Procedure Rules⁸ stipulates that to bring a commercial case in the commercial division the value of the claim shall be at least 1 million shillings in case of proceedings for recovery of possessions of immovable property and at least 70 million shillings in proceedings where the subject matter is capable of being estimated at a monetary value.

As provided by Section 23 of the Capital Markets and Securities Act,⁹ if it appears to the Court that a person has committed an offence or contravened the conditions or restrictions or rules of the stock exchange, or is about to do an act with respect to dealing in securities that, if done, would be such an offence or contravention, it may within its powers make one of the following orders, but is not limited to these orders:

- a* an order restricting a person acquiring, disposing of or otherwise dealing with any securities that are specified in the order;
- b* an order declaring a contract relating to securities to be void or voidable;
- c* an order directing a person to do or refrain from doing a specified act; and
- d* in the case of persistent breaches of the Act or conditions or restrictions of a licence, or of the rules or listing rules of the stock exchange, an order restraining a person from carrying in securities, acting as an investment adviser or as a dealer's representative or investment representative, or from holding him or herself out as carrying on such business or so acting.

II THE YEAR IN REVIEW

Between June 2013 and September 2014, the CMSA has completed its installation and implementation of a new surveillance system that is designed to assist in the monitoring of trading activities at the DSE on a real-time basis. The new system provides additional essential features for the proper surveillance of securities trading at the exchange.

The year has also seen the CMSA's approval of new DSE rules, which include:

- a* removal of DSE powers over prospectuses (Rule 49);
- b* rules on members' disciplinary procedures (Rules 23) – previously unavailable;
- c* extension of stock exchange membership to include members from custodians and central securities depositories (Rule 7-12);
- d* introduction of enterprise growth market rules (Rule 60-83) – previously unavailable;
- e* the DSE Central Securities Depository will be the 'definitive register' and shall represent the final register of ownership (Rule 162);

8 The High Court (Commercial Division) Procedure Rules, 2012.

9 The Capital Markets and Securities Act, 1994 (Act No. 5 of 1994 as amended by Act No. 4 of 1997).

- f* an improved listing process and the introduction of new products to be listed on the exchange including collective investment schemes, and real estate investment trusts (REITs) and exchange traded funds (ETFs); and
- g* an increase in trading hours.

Other significant changes can be noted in the launching of the new EGM, which became operational in November 2013. The EGM is an equity market specifically intended for small and medium-sized enterprises (SMEs) and start-ups. With the liberalisation of the Tanzanian economy, entrepreneurship is growing more and more; the number of SMEs has been increasing and is expected to increase further. However, both the government's policy and strategic studies and the CMSA's capital markets studies have unequivocally shown that access to capital has been a key hindrance to the development of entrepreneurship and growth of SMEs.

The year also witnessed the approval of the Policy Paper on Formation of the Commodity Exchange, which was granted by Cabinet in June 2014, of which the CMSA has been mandated to regulate the exchange. It should be noted that while awaiting clearance of the Cabinet Paper for the Capital Markets and Commodity Exchanges legislation by the Ministry of Finance for onward submission to the Cabinet Secretariat, the CMSA continued with other activities for the establishment of commodity exchange. The CMSA has prepared a memorandum and articles of association (Memarts) for the proposed Commodity Exchange of Tanzania Company (CXT). Our research also indicates that the CMSA has also met with various institutions including the Tanzania Confederations of Cooperatives (TFC), the Tanzania Private Sector Foundation (TPSF) and Pension Funds with a view to identifying the first subscribers to the commodity exchange company.

In the equity markets it should be noted that total turnover for year ended 30 June 2014 increased significantly compared with the turnover recorded during the year ended 30 June 2013. The DSE posted turnover amounting to 272.38 billion shillings compared to 73.53 billion shillings, which was recorded during the year ended 30 June 2013. The DSE recorded high turnover during the year ended 30 June 2013 due to the International Finance Corporation (IFC) disinvestment in Tanzania Breweries Limited (TBL) when it sold its shares worth 140.98 billion shillings. TBL had the largest share of the total turnover accounting for 61.99 per cent, followed by CRDB Bank Plc and NMB Bank Plc, which accounted for 24.45 per cent and 8.21 per cent of the total turnover respectively. Only one cross-listed company, National Media Group, traded shares worth 34.66 million shillings at the DSE during the year under review. During the year under review, foreign investors' contribution in the total equity turnover was 25.92 per cent compared to 19.48 per cent, which was recorded during the year ended 30 June 2013.

The total market capitalisation increased by 45.99 per cent to 18,902.16 billion shillings on 30 June 2014 compared to 12,948 billion shillings recorded on 30 June 2013. The increase in market capitalisation was mainly due to the appreciation of the share price of listed companies, particularly TBL – 239.16 per cent, NMB – 146.30 per cent, Tanzania Oxygen Limited (TOL) – 90.38 per cent, TCC – 72.31 per cent, Swissport – 28.16 per cent, DCB – 20 per cent, CRDB – 14.29 per cent, and Tanzania Tea Packers (TATEPA) – 8.33 per cent, which outweighed the impact of Twiga Cement's share price decrease of 12.78 per cent and Precision Airways' 1.05 per cent. Domestic

companies market capitalisation as a percentage of GDP reached 13.81 while total market capitalisation (domestic and cross-listed shares) reached 38.69 per cent.

During the year under review Maendeleo Bank PLC and Swala Oil and Gas (Tanzania) PLC offered shares to the public while TOL had a rights issue. Maendeleo Bank PLC listed 8 million ordinary shares at a price of 500 shillings per share on the EGM on 5 November 2013. TOL Gases Ltd offered 18.61 million ordinary shares by way of a rights issue to collect money for major refurbishment of the Aspen 1000 plant. TOL sold the shares at a discounted price of 240 shillings each in the right issue that was opened on 26 November to 31 December 2013. Swala Oil and Gas PLC offered 9.6 million shares at a price of 500 shillings per share to raise up to 4.8 billion shillings. Our research also indicates that the CMSA has received an application to offer shares to the public from Mbinga Community Bank. The application is currently under review.

The year noted a decrease in activity in the bonds market. Treasury bonds with different maturities worth 977.0 billion shillings were listed during the year ended 30 June 2014 compared to 1,056.89 billion shillings, which were listed during the year ended 30 June 2013. Total outstanding Treasury bonds as per the DSE registry reached 3,629.98 billion shillings on 30 June 2014 compared to 2,961.04 billion shillings recorded on 30 June 2013. On the secondary market, Treasury bonds worth 477.14 billion shillings were traded during the year ended 30 June 2014 compared to Treasury bonds worth 395.33 billion shillings traded during the year ended 30 June 2013. There was no new issuance of corporate bonds during the quarter under review. There were four corporate bonds stock at the end of the quarter with outstanding amounts of 42.57 billion shillings. No corporate bond traded during the year under review.

Looking at the performance and continuous disclosure by unlisted companies, it understood that with the exception of Precision Air Service (PAL) and Kenya Airways the performance of all listed companies was satisfactory. Management has requested PAL to submit a turnaround strategy that indicates how the company can redress its poor performance. Precision Air financial year ended 31 March 2014. Management is following up with the PAL's Management so that the financial statements are finalised and published. TOL posted profit amounting to 998.49 million shillings during the year ended 31 March 2013 compared to the profit of 952.10 million shillings registered during the previous year, which indicates good future prospects to generate more profit and eventually pay dividend to its shareholders.

i Developments affecting derivatives, securitisations and other structured products

Having established the need for restructuring the market structure in 2013, the CMSA considered various alternatives. The two main contending solutions to restructuring equities markets were the creation of EGM or the fostering of the over-the-counter (OTC) market. The CMSA's appropriate market structure study examined both scenarios. Both local surveys and experience from other countries pointed in the direction of EGM. The CMSA found that the *ad hoc*, not organised and not formalised structure of OTC is not suitable for Tanzania. Surveyed potential issuers and investors were extremely uncomfortable with the lack of organisation and formalisation of OTC trade.

ii Cases and dispute settlement

There have been no recent developments in case law involving disputes relating to cross-border financial market activity or trading pursuant to market standard contracts.

iii Relevant tax and insolvency law

There have been no recent developments with regard to tax on cross-border transactions. The position remains that, pursuant to Section 82 of the ITA, a Tanzanian resident must withhold income tax if he or she pays to a non-resident a dividend, interest, natural resource payment, rent or royalty, and the payment has a source in Tanzania. Section 3 of the ITA defines 'interest' to mean a payment for the use of money and includes a payment made or accrued under a debt obligation that is not a repayment of capital and any gain realised by way of a discount, premium, swap payment or similar payment, payments made under a financial lease, transfers between a permanent establishment and its owner and on-compliance interests. In practice payments to be made under a transaction would fall within the meaning of 'interest' and as such would be subject to a 10 per cent withholding tax.

Based on a plain reading of the Companies Act, the BFIA and the Bankruptcy Act, our analysis is that close-out netting – and contractual clauses that provide for it – are enforceable in Tanzania; also, in the event of insolvency or bankruptcy such net claim would rank equally with other unsecured unsubordinated claims of the insolvent party. No law in Tanzania contains an express prohibition against close-out netting clauses. Furthermore, Section 36 of the Bankruptcy Act allows for the sum due from one party to another in respect of mutual dealings to be set-off against the sum due from the other party and for no more than the balance to be claimed or paid. That said, set-off (including close-out netting) is applicable for multiple transactions between the parties and an insolvency practitioner does not have the power to 'cherry pick' which trades under any OTC agreement it would enforce and which it would reject a claim in an insolvency procedure can be filed in a foreign currency.

iv Role of exchanges

There have been no recent developments with regard to the role of exchanges on cross-border transactions, the position remains that the BOT issues foreign exchange circulars that are intended to guide banks and financial institutions involved in the administration and management of foreign exchange transactions. Although the government of Tanzania liberalised the exchange control regime in Tanzania, the Foreign Exchange Circular No. 6000/DEM/EX.REG/58 renders certain foreign exchange transactions subject to exchange control restrictions that vary depending on the type of transaction in question.

The range of foreign exchange transactions still subject to regulatory restrictions includes outward portfolio investments, foreign lending operations in favour of non-residents, acquisition of real estate, outward direct investment and the operation of offshore foreign currency accounts by residents. All these require BOT approval. As a result of the recent initiatives to liberalise the capital account, the participation of non-residents in domestic money and capital markets is now allowed.

III OUTLOOK AND CONCLUSIONS

Overall, the outlook for the capital markets industry in Tanzania is on the up. Issues to look out for include the overhaul of CMSA legislation in particular the new Capital Markets and Commodity Exchange Act (the Bill is intended to be submitted in the November 2014 session of Parliament), which includes:

- a* provisions on the establishment of central securities depositories which would be independent of stock exchanges;
- b* provisions mandating the Authority to deal with prospectuses of issuers;
- c* provisions governing the recognition of intermediaries' licences in other jurisdictions;
- d* provisions on licensing and supervising commodity exchanges;
- e* provisions on the regulatory structure for the introduction and licensing of credit rating agencies which are licensed outside Tanzania; and
- f* provisions on the introduction of a Market Development Fund.

It is understood that as part of strategic initiatives to increase accessibility to capital markets for retail investors, the CMSA in collaboration with the DSE is in the final stages of establishing a mobile gateway solution that will be utilised to facilitate the use of mobile technology in trading securities in both the primary and secondary markets. Our research also indicates that the CMSA has identified a vendor capable of providing a gateway solution and the necessary infrastructure and capacity to trade securities securely, efficiently and at low cost.

The launch of the mobile-linked capital markets products is expected to increase the number of retail investors from 200,000 to over 5 million within three years from commencement of the service. The service should increase the proximity of the public to financial services and investment opportunities.

Appendix 1

ABOUT THE AUTHORS

KAMANGA WILBERT KAPINGA

Mkono & Co Advocates

Kamanga Wilbert Kapinga is an associate who specialises in telecommunications and information communication technology law. He also regularly advises clients on banking and finance transactions, labour law, mergers and acquisitions. He has wide expertise in advising international and national clients on setting up businesses in Tanzania, legal advisory services to international clients on regulatory compliance specifically in the banking industry, the telecoms industry, the oil and gas industry, and the mining industry.

Mr Kapinga is also licensed to advise small and medium-sized enterprises to list on the enterprise growth market segment at the Dar Es Salaam Stock Exchange. His qualifications include: the Securities Industry Certification Course, Capital Markets and Securities Authority of Tanzania (CMSA) 2013; Law School of Tanzania Legal Practical Course 2010–2011; King’s College London LLM with specialisation in Regulation and Technology 2008–2009; the University of Warwick LLB Bachelor of Laws (Honours) 2005–2008; and United World College of Southern Africa, Waterford Kamhlaba Mbabane, Swaziland, International Baccalaureate 2003–2004.

KENNETH MWASI NZAGI

Capital Markets and Securities Authority of Tanzania

Kenneth Mwasi Nzagi specialises in capital markets and securities laws in Tanzania. He has been involved in regulating, training, inspecting, supervising and licensing market intermediaries on issues relating to initial public offerings, rights issues, cross-listing, *inter alia*. He has vast experience in advising domestic and international organisations and assisting with the establishment of collective investments, real estate investment trusts, licensing intermediaries and developing new regional legislations governing the capital markets industry in the East African Community.

Mr Nzagi is a chartered company secretary and administrator (UK) and has undergone certified training with the Securities Exchange Commission (United States), the London Stock Exchange (United Kingdom) and the International Organization of Securities Commissions (Spain) as well as being technical committee member for the East African Community. His qualifications include: Law School of Tanzania Legal Practice Course 2010–2011; Institute of Chartered Secretaries and Administrators GradICSA 2009–2011; University of Portsmouth LLM (commercial law, corporate governance and financial administration) 2009–2011; Sheffield University (comparative law); Utrecht University (civil law) 2006; Bellerby's College, UK; and Dar es Salaam Independent School.

MKONO & CO ADVOCATES

8th floor, Exim Tower

Ghana Avenue

PO Box 4369

Dar es Salaam

Tanzania

Tel: +255 22 211 8789 91 / 219 4200 / 211 4664

Fax: +255 22 211 3247 / 211 6635

info@mkono.com

www.mkono.com